TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 530.

TONY VIGLIOTTI, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED [illegible], 1921.

(28,496)

(28,485)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 1, 1922.

1 COMMONWEALTH

v.

TONY VIGLIOTTI and ROSI VIGLIOTTI.

Sessions Docket Entries.

1. Selling Liquor without License.

2. Selling Liquor on Sunday.

John J. Smith, Pros.
Now, June 9th, True Bill.

A. M. HAINES,
Foreman.

Now, June 17th, 1920, this case being called for trial, the defendants plead not guilty, Dist. Att'y. similiter issue, &c. same day jury sworn, tried, and same day verdict that the defendants are guilty on the first count and not guilty on the second count in the Bill of Indictment. June 17th, 1920, motion to quash the Indictment presented to Court and upon consideration thereof it is refused and dismissed. By the Court.

Defendants by their Attorney except and at their instance bill sealed. E. H. Reppert, Judge (Seal). Same day defendants' points filed. June 18th, 1920, motion for new trial and motion in arrest of Judgment filed. And now, August 10th, 1920, after argument and consideration the motion for arrest of judgment and for a new trial, are overruled and dismissed. By the Court.

And now, August 31st, 1920, the Court sentence the defendant Tony Vigliotti to pay a fine of One Thousand (1000.00) Dollars to the Commonwealth, pay the costs of prosecution and undergo an imprisonment in the Allegheny County Workhouse, for and during a period of six (6) months there to be kept, fed, clothed and treated as the law directs, and stand committed until the sentence be complied with. Same day certificate to Sheriff issued.

Same day the Court sentence the defendant, Rosi Vigliotti, to pay a fine of Seven Hundred Fifty (750.00) Dollars to the Commonwealth, pay the cost of prosecution and undergo an imprisonment in the Allegheny County Workhouse, for and during a period of six (6) months there to be kept, fed, clothed, and treated as the law directs, and stand committed until the sentence be complied with. Same day Cert. issued.

August 31st, 1920, Petition appeal filed. Same day defendants' stipulation filed. And now August 31st, 1920, petition presented in Court and after and upon consideration, it is ordered and adjudged that the appeal taken by the defendant to the Superior Court be, and hereby it is made supersedeas upon the defendants giving bond with surety, to be approved by the Court, conditioned for a com-

pliance with the sentence if the appeal be not prosecuted with effect, or the writ non prossed, the appeal dismissed, or the sentence affirmed. By the Court, same day.

Bond in the sum of $2,000.00 with Rob't Partrielle as surety filed.

September 2nd, 1920, Certiorari from the Superior Court received and filed. Tony Vigliotti and Rosi Vigliotti, Appellants. Same day notice accepted as per indorsement of Wm. A. Miller, Dist Att'y. Oct. 2nd, 1920 transcribed notes of testimony filed.

10 In the Court of Quarter Sessions of the Peace in and for the County of Fayette, June Sessions, A. D. 1920.

No. 80.

FAYETTE COUNTY, *ss:*

The Grand Inquest of the Commonwealth of Pennsylvania now inquiring in and for the body of the County of Fayette, upon their oaths and solemn affirmations, respectively, do present, that Tony Vigliotti and Rosi Vigliotti late of the county aforesaid, yeoman and woman on the seventh day of June in the year of our Lord one thousand nine hundred and twenty, at the county aforesaid and within the jurisdiction of this court, unlawfully did sell and offer for sale vinous, spirituous, malt and brewed liquors and admixtures thereof, without having first obtained a license agreeably to law for that purpose, contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

And the grand inquest aforesaid, upon their respective oaths and solemn affirmations aforesaid, do further present, that the said Tony Vigliotti and Rosi Vigliotti on the same day and year aforesaid at the county aforesaid, and within the jurisdiction of this court, unlawfully did then and there furnish by sale, spirituous, vinous, malt and brewed liquors, on the first day of the week commonly called Sunday contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

(Signed) WM. A. MILLER,
District Attorney for Fayette County.

11 Endorsement: No. 80, June Sess., 1920. Commonwealth vs. Tony Vigliotti and Rosi Vigliotti. 1. Selling Liquor Without License. 2. Selling Liquor on Sunday. Misdemeanor. Prosecutor: John J. Smith. Now, June 9, 1920. True Bill. A. M. Haines, Foreman. And now, June 17, 1920, the Defendant pleads not guilty. S. Horn for Deft. Same day Dist. Atty. similiter, issue, &c. Labin. Ret'd & filed June 10, 1920. Commonwealth witnesses, John J. Smith, (Prosecutor), William Smith√, James Beasley√, Marsh Hendrixson, L. M. Barker, George Kelley√, Lasco Haskins, Harry Wait√, Johnson√. I hereby certify that the above witnesses whose names are marked thus √ were sworn or affirmed and examined before the Grand Jury. A. M. Haines, Foreman.

12 In the Court of Quarter Sessions of Fayette County, June Term, 1920.

No. 80.

COMMONWEALTH
vs.
TONY VIGLIOTTI, ROSI VIGLIOTTI.

And now, June 15th, 1920, come the defendants by their attorneys, and before plea entered, move to quash the indictment and in support of such motion say:

1. The matters and things charged in the indictment do not constitute an offense under the law of Pennsylvania.

2. The indictment does not charge an indictable offense.

STERLING, HIGBEE & MATTHEWS,
Attorneys for Defendants.

Endorsement: No. 80, June Term, 1920. Commonwealth v. Tony Vigliotti, Rosi Vigliotti. Motion to Quash Indictment.

June 17, 1920, the within motion presented in court and upon consideration thereof it is refused and dismissed.

BY THE COURT.

Attest:
ALFRED O'NEAL,
Clerk.

Defendants by their attorneys except and at their instance bill sealed.

E. H. REPPERT, [SEAL.]
Judge.

S. H. & M. Filed June 17, 1920.

13–15 In the Court of Quarter Sessions of Fayette County, June Term, 1920.

No. 80.

COMMONWEALTH
vs.
TONY VIGLIOTTI, ROSI VIGLIOTTI.

And now June 17th, 1920, the case having been closed and the witnesses discharged, the defendants by their attorneys respectfully request the Court to instruct the jury as follows:

1. Under all the evidence the defendants can not be convicted.
Answer: Refused.

2. Under all the evidence there can be no conviction of the defendant, Tony Vigliotti, on the first count of the indictment.
Answer: Refused.

3. Under all the evidence there can be no conviction of the defendant, Rosi Vigliotti, on the first count of the indictment.
Answer: Refused.

4. Under all the evidence there can be no conviction of the defendant, Tony, on the second count of the indictment.
Withdrawn.

5. Under all the evidence there can be conviction of the defendant, Rosi, on the second count of the indictment.
Withdrawn.

6. In this case the jury are the judges of the law and the facts.
Answer: Counsel have asked for a categorical answer to this point. In our judgment the defendants are not entitled to an affirmation of the request without explanation or qualification. The best evidence the jurors have of the law is the instructions of the court. It is our duty to declare the law to them, and it is their duty to accept it when so declared. The point is therefore refused.

And now, June 17th, 1920, defendants by their counsel except to the answers of the Court to the foregoing points and at their instance bill sealed.

E. H. REPPERT, [SEAL.]
Judge.

Endorsement: No. 80, June Term, 1920. Commonwealth vs. Tony Vigliotti, Rosi Vigliotti. Defendants' Points. S. H. & M. Filed June 17, 1920.

16–18 In the Court of Quarter Sessions of the County of Fayette. of June Sess., 1920.

No. 80.

COMMONWEALTH

versus

TONY VIGLIOTTI and ROSI VIGLIOTTI.

Verdict.

And now, to-wit: June 17, 1920, we, the Jurors empaneled in the above entitled case, find the defendants guilty of selling spirit-ous liquor, without a license, and not guilty of selling same on Sunday.

JOHN L. LOVE,
Foreman.

Endorsement: No. 80, June Sess., 1920. Commonwealth vs. Tony Vigliotti, Rosi Vigliotti. Verdict. Filed June 17, 1920. —— ——, Clerk.

* * * * * * *

19 In the Court of Quarter Sessions of Fayette County, June Sessions, 1920.

No. 80.

COMMONWEALTH OF PENNSYLVANIA

vs.

TONY VIGLIOTTI & ROSI VIGLIOTTI.

And now, August 10, 1920, defendants except to the order of Court overruling their motion in arrest of judgment, and at their instance bill sealed.

E. H. REPPERT, [SEAL.]
Judge.

Endorsement: No. 80, June Sess., 1920. Commonwealth vs. Tony Vigliotti and Rosi Vigliotti. Exception to Order Overruling Motion in Arrest of Judgment.

20 In the Court of Quarter Sessions of Fayette County, June Term, 1920.

No. 80.

COMMONWEALTH

vs.

TONY VIGLIOTTI and ROSI VIGLIOTTI.

Come now the defendants, Tony Vigliotti and Rosi Vigliotti, by their attorneys, and move that judgment be arrested, and in support of such motion say:

1. The first count in the indictment upon which the defendants were convicted by the jury is drawn under Section 15 of the Act of May the 13th, 1887, P. L. 113, commonly called the "Brooks Law," and is superseded and repealed by the 18th amendment to the constitution of the United States, ratified January 20, 1919, and the Act of Congress adopted in pursuance thereof, commonly known as the Volstead Act.

2. Section 15 of the Brooks Act is not an exercise by the State of Pennsylvania of its authority under the 18th amendment to the constitution of the United States to enact appropriate legislation for enforcing the prohibitions ordained by that amendment.

3. The State of Pennsylvania has not enacted any appropriate legislation to enforce the prohibitions of the 18th amendment to the constitution of the United States.

4. The first count of the bill of indictment does not charge an indictable offense.

STERLING, HIGBEE & MATTHEWS,
Attorneys for Defendants.

Endorsement: No. 80, June Term, 1920. Commonwealth v. Tony Vigliotti and Rosi Vigliotti. Motion in Arrest of Judgment. Filed June 18, 1920.

21 In the Court of Quarter Sessions of Fayette County, June Term, 1920.

No. 80.

COMMONWEALTH

vs.

TONY VIGLIOTTI and ROSI VIGLIOTTI.

Come now the defendants, and move for a new trial of this cause, and in support of such motion say:

1. The court erred in overruling defendants' motion to withdraw juror and continue the cause, which motion was based on the exhibition to the jury throughout the trial of a large quantity of Jamaica ginger, wine, ginger ale, and other liquors unlawfully taken by the deputy sheriff from the property and premises of the defendants, none of which was properly admissible in evidence, and a large part of which was not even offered in evidence, and its inadmissibility being indicated, was withdrawn.

2. The manifest and obvious purposes of the exhibition of these articles was to prejudice and bias the jury in its consideration of the case, and which as a matter of fact did prejudice the case against the defendants.

3. The effect on the jury is manifest from an account of the trial published in a newspaper of which a member of the present panel of jurymen is president, but he did not sit in the trial of this particular cause, but which article was apparently written by him, the part thereof dealing with this phase of the case is hereto appended.

(*Newspaper Clipping.*)

The court room resembled a shipping warehouse. Boxes and cartons were piled high in front of the jury box, fourteen cases in all, containing upwards of two thousand bottles of Jamaica ginger and a quantity of Farocina, an 18 per cent alcoholic beverage. The

stuff was confiscated at Vigliotti's store after evidence had been secured by the District Attorney's office, and brought to the court house on a truck.

STERLING, HIGBEE & MATTHEWS,
Attorneys for Defendants.

Endorsement: No. 80, June Term, 1920. Commonwealth vs. Tony Vigliotti and Rosi Vigliotti. Motion for New Trial. S. H. & M. Filed June 18, 1920.

22 In the Quarter Sessions of Fayette County, June Term, 1920.

No. 80.

COMMONWEALTH

vs.

TONY VIGLIOTTI and ROSI VIGLIOTTI.

Motions in Arrest of Judgment and for a New Trial.

Opinion and Order.

The defendants were convicted of selling liquor without license. The reasons assigned in support of the motions in arrest of judgment and for a new trial were earnestly pressed during the hearing of the case. At the argument on the motions, while none of the reasons was withdrawn, the discussion was confined practically to the question of jurisdiction, as are also the briefs filed. It was urged that the Act of May 13, 1887, P. L. 113, commonly called the Brooks Law, under which the indictment was drawn, is superseded and repealed by the 18th amendment to the Constitution of the United States and the Volstead Act passed by the Congress pursuant thereto, and that said act is not an exercise by the state of its power under said amendment to enact appropriate legislation to enforce the amendment. We do not agree with this view.

"The constitutional power of Congress to enact regulations to define crimes and provide for their punishment implies the power to enact that such legislation shall be exclusive of the statutes of the states, and if it does so expressly or impliedly the states cannot punish such acts as offenses against the states. When this is not done, either expressly or by necessary implication, the statute of the state is not superceded by the federal statute, and the same act may be punished as an offense against the United States and also as an offense against the state"—16 Corpus Jurs. 62; 8 R. L. C. Sec. 57, page 98; Weaver vs. Fegely, 29 Pa. 27.

Within the concurrent field of legislation, common to both federal and state government, "a state law is superseded by a federal regulation only to the extent that the two may be inconsistent. * * * It is the actual conflict of legislation which operates to suspend inconsistent state laws." 6 R. C. L. Sec. 140, page 139.

The first Section of the Act of 1887 reads: "It shall be unlawful to keep or maintain any house, room or place, hotel, inn or tavern, where any vinous, spirituous, malt or brewed liquors, or any
23 admixtures thereof, are sold by retail, except a license therefor shall have been previously obtained as hereinafter provided." The body of this section is not hostile to or in conflict with the amendment or the Volstead Act and is therefore unaffected by either. The legislature had the right to enact it. The right has never been suspended for an instant and still exist-. The continuing right to enact the body of the section cannot be questioned; no more can the law itself. To the sale of liquors thus prohibited there is an exception, and to the extent that the exception authorizes or sanctions what the federal law prohibits, it is superseded or suspended thereby. That dominant authority narrows the scope of the exception, or suspends it altogether, is no reason why the people of the state should be deprived of the protection of the body of the section or of the penalties for its violation, provided in section fifteen. The defendants do not come within the exception. The jury have found that they did what the act prohibits. What is it to them how federal enactment may have affected the exception?

It is not contended that state legislation to be effective in support of the amendment must have been passed subsequent to its adoption, but it is asserted that the Brooks Law was intended to sanction and authorize the sale of liquors and is therefore not appropriate legislation to that end. The purpose of the Brooks Law as expressed in its title is "to restrain and regulate the sale of vinous and spirituous malt, or brewed liquors, or any admixtures thereof," and in terms the act prohibits such sale, except a license therefor should first be obtained, and prescribes penalties for the violation of its provisions. The provisions of the act and its results are entirely consistent with its purpose, and the consistency is not affected or destroyed
24 by the limitation or destruction of the exception. It is a prohibitory law, and has been so construed and enforced, in some of the counties of the state to the extent of total interdiction. It is true that it provides for the granting of licenses to sell upon certain conditions and under certain circumstances and may therefore be said to contemplate the granting of licenses when the conditions and circumstances have been shown to exist. But the burden of proving the existence of the conditions and circumstances is upon the applicant and in the absence of such proof the license is refused. Thereupon the exception fails and the prohibitory provisions of the law remain undisturbed.

We are not usurping legislative authority as counsel in the exuberance of their wholly commendable zeal intimate. We are enforcing the provisions of a statute which, in our judgment, are in full life and being and whose purpose is to protect the community from just such flagrant offenses against its peace and good order as these of which the defendants have been found guilty.

The views herein expressed are in harmony with all the decisions of the courts of the state since the amendment went into effect, called to our attention, and particularly with Comm. vs. Oliva-

dotti, 3 Montgomery County Law Reporter, 209, and Comm. vs. Hido, 1 Somerset Legal Journal 3, where the same question is ruled adversely to the contention of the defendants.

Order.

And now, August 10, 1920, after argument and consideration, the motions in arrest of judgment and for a new trial are overruled and dismissed.

By THE COURT.

Attest:

ALFRED O'NEAL,
Clerk.

Endorsement: No. 80, June Term, 1920. Commonwealth vs. Tony Vigliotti and Rosi Vigliotti. Opinion and Order. Filed Aug. 10, 1920.

25 In the Court of Quarter Sessions of Fayette County, Pennsylvania, June Sessions, 1920.

No. 80.

COMMONWEALTH

vs.

TONY VIGLIOTTI and ROSI VIGLIOTTI.

Before Hon. E. H. Reppert, J., and Jury, June 17, 1920.

Appearances:

Harry W. Byrne, Assistant District Attorney, for the Commonwealth.

Sterling, Higbee & Matthews, for the defendants.

Mr. Higbee: The indictment containing a count charging the defendants with the crime of selling liquor without license, and neither the complaint nor the indictment alleging the date when the sale was made or the person to whom it was made, which is relied upon to constitute that offense and accomplish the conviction of the defendants; and the indictment containing another count charging the defendants with selling liquor on Sunday, and neither the complaint nor the indictment showing the date of the alleged sale nor the person to whom it was made, the defendants, in order to plead to the indictment, move that the Commonwealth be required to specify the act relied upon to constitute the offense charged in the respective counts of the indictment.

By the Court: The motion is overruled. Exception.

26–102 Mr. Higbee: The defendants demand from the Commonwealth a bill of particulars of the act or acts on which

they seek the conviction of the defendants under the two counts in the indictment.

By the Court: The motion is overruled. Exception.

Mr. Higbee: The defendants having pleaded not guilty to the indictment, renew the former motion, for the purpose of enabling them to present a defense to the charge which the Commonwealth may attempt to prove under the bill.

By the Court: The motion is overruled. Exception.

* * * * * * *

103 Mr. Higbee: And now June 17th, 1920, the case having closed and the witnesses discharged, the defendants by their attorneys respectfully request the Court to instruct the jury as follows:

1. Under all the evidence the defendants cannot be convicted.
Answer. Refused.

2. Under all the evidence there can be no conviction of the defendant, Tony Vigliotti, on the first count of the indictment.
Answer. Refused.

3. Under all the evidence there can be no conviction of the defendant, Rosi Vigliotti, on the first count of the indictment.
Answer. Refused.

4. Under all the evidence there can be no conviction of the defendant, Tony, on the second count of the indictment.
Withdrawn.

5. Under all the evidence there can be no conviction of the defendant, Rosi, on the second count of the indictment.
Withdrawn.

6. In this case the jury are the judges of the law and the facts.
Answer. Counsel have asked for a categorical answer to this point. In our judgment the defendants are not entitled to an affirmation of the request without explanation or qualification. The best evidence the jurors have of the law is the instructions of the court. It is our duty to declare the law to them, and it is their duty to accept it when so declared. The point is therefore refused.

104 And now, June 17th, 1920, defendants by their counsel except to the answers of the Court to the foregoing points and at their instance bill sealed.

E. H. REPPERT, [SEAL.]
Judge.

105 *Charge to the Jury.*

Gentlemen of the jury, there are two counts in the indictment upon which you are trying these defendants.

First. For selling liquor without a license; and

Second. For selling liquor on Sunday.

There are really only three questions in the case for you to determine. The first is, "Did the defendants sell the Jamaica ginger and the contents of the bottle marked *c*-16 to those who testify that they purchased them?" Second, "Did they make any of these sales on Sunday?" And third, "Were the goods so sold a vinous, spirituous, malt or brewed liquor, or an admixture thereof?"

A spirituous liquor is one containing alcohol and an admixture with spirits might render the compound spirituous.

The Commonwealth alleges that the Jamaica ginger by analysis has been shown to be a spirituous liquor. The chemist who analyzed some of the goods found upon the premises, which is similar in appearance, content and label to the goods sold, testifies that it contains eighty per cent of alcohol.

Those who purchased it testify that it has an alcoholic effect, the same as alcoholic liquor.

In this state, it is unlawful, with certain exceptions, to sell vinous, spirituous, malt or brewed liquor, or an admixture thereof. Only two classes of persons are permitted to make such sales, first those to whom licenses to sell have been granted by the proper authorities; and second, apothecaries and druggists who may sell under certain conditions and under certain restrictions.

There has been considerable testimony offered in the case by those who actually purchased Jamaica ginger of these defendants, one of the witnesses saying that he purchased every day or two for a considerable period, and that he also purchased on Sunday.

If these defendants, or either of them sold Jamaica ginger to the witnesses for the Commonwealth, and if you find that this Jamaica ginger is a spirituous liquor, and that it was sold, amongst
106 other days, on Sundays, then you should find these defendants guilty in manner and form as they stand indicted.

If you find that the Jamaica ginger, and Exhibit *c*-16, is not a vinous, spirituous, malt or brewed liquor, then, of course, these defendants would not be guilty, either of selling on Sunday or at any other time, without a license.

The testimony is entirely for you, gentlemen, and you will take it and determine what the facts are, bearing in mind the testimony of those who purchased, as to the goods they purchased and the effect it had upon them, when they drank it, and the testimony of the chemist who analyzed it and determined the alcoholic content, and if, from all of this testimony, you find beyond a reasonable doubt that the goods sold was a spirituous liquor, or any admixture thereof, you should find them guilty of selling without a license.

If they sold vinuous, spirituous, malt or brewed liquor on Sunday, you should find them guilty also on that charge in the indictment.

As I said before, it is the duty of the Commonwealth to satisfy you of their guilt beyond a reasonable doubt.

A reasonable doubt is not one that a juror may conjure up in his mind in order to escape the consequence of rendering an unpleasant verdict. It is a substantial doubt, arising out of the fair consideration of all the evidence, one that causes the juror to hesitate in

coming to a conclusion of guilt. Jurymen have no right arbitrarily to reject a fair, reasonable and logical conclusion from the evidence offered.

In case you acquit, you will dispose of the costs, placing them either upon the prosecutor or upon the defendants, or dividing them equally or unequally between the prosecutor and the defendants, or you may place them upon the county.

In case you convict, you will make no disposition of the costs.

107 Mr. Higbee: The defendants, before the jury retires, respectfully except to the charge of the court, for the reasons following:

That the charge left it to the jury to convict the defendants on more than one act of sale.

That the charge of the court left it to the jury to convict the defendants of the sale on the second count of the indictment, of the sale on Sunday.

That the charge of the court defines a spirituous liquor so that it might include what was merely an admixture, and to the answer of the court to the defendants' points.

Bearing in mind, gentlemen, the instructions we have heretofore given, you may now retire and make up your verdict.

I hereby certify that the proceedings, evidence, and charge are contained fully and accurately in the notes taken by me on the trial of the above cause, and that this copy is a correct transcript of the same.

(Signed) ELLA ROCKWELL,
Stenographer.

The foregoing record of the proceedings upon the trial of the above cause is hereby approved and directed to be filed.

(Signed.) E. H. REPPERT,
Judge.

Endorsement: No. 80, June Sess., 1920. Commonwealth v. Tony Vigliotti and Rosi Vigliotti. Notes of Testimony. Filed Oct. 2, 1920.

108–110 In the Court of Quarter Sessions of Fayette County, June Sessions, 1920.

No. 80.

COMMONWEALTH

vs.

TONY VIGLIOTTI and ROSI VIGLIOTTI.

Tony Vigliott and Rosi Vigliotti, defendants above named, hereby declare and stipulate that they do not have in their possession, or custody, or in the possession or custody of either of them at their

store, residence or at any other place whatsoever, any Jamaica ginger or any other intoxicants or narcotics, and the Defendants further promise and stipulate that they will not have in their possession, or in the possession of any person for them, for any purpose whatsoever, any Jamaica ginger, or any other intoxicants, or narcotics, so long as their appeal from the sentence at the above number and term remains pending and undetermined.

The Defendants further declare that they have not kept for sale, sold or offered for sale since their arrest any Jamacia ginger, or other intoxicants, nor have they had any such in their possession, custody or control since that date.

(Signed) ANTONIO VIGLIOTTI.
(Signed) ROSI VIGLIOTTI.

Endorsement: No. 80, June Sessions, 1920. Commonwealth, vs. Tony Vigliotti and Rosi Vigliotti. Stipulation. Filed Aug. 31, 1920. Sterling, Higbee & Matthews, Attorneys at Law.

111 In the Court of Quarter Sessions of Fayette County, June Sessions, 1920.

No. 80.

COMMONWEALTH

vs.

TONY VIGLIOTTI.

To the Honorable the Judges of said Court:

The petition and representation of Tony Vigliotti respectfully presents:

That he has appealed from the sentence of your Honorable Court imposed upon him at the above number and term, to the Superior Court of Pennsylvania. He therefore prays that the said appeal may be made a supersedeas, and that he be discharged from the custody of the Sheriff pending the said appeal upon his giving security to comply with the sentence, in the event that the appeal is not prosecuted with effect, that the writ be non prossed, the appeal dismissed or the sentence affirmed, in such sum as your Honorable Court may fix.

(Signed) ANTONIO VIGLIOTTI.

STATE OF PENNSYLVANIA,
County of Fayette, ss:

Tony Vigliotti, the defendant above named, being duly sworn according to law, doth depose and say that the statements contained in the foregoing petition are true and correct.

(Signed) ANTONIO VIGLIOTTI.

Sworn and subscribed before me this 31 day of August, 1920.
ALFRED O'NEAL,
Clerk of Courts.

112–116 And now, August 31st, 1920, the within petition presented in court and after and upon consideration, it is ordered and adjudged that the appeal taken by the defendant to the Superior Court be, and hereby it is made supersedeas upon the defendants giving bond in the sum of Two Thousand Dollars with surety, to be approved by the court, conditioned for a compliance with the sentence if the appeal be not prosecuted with effect, or the writ non prossed, the appeal dismissed, or the sentence affirmed.
By THE COURT.

Attest:
ALFRED O'NEAL,
Clerk.

Endorsement: No. 80, June Session, 1920. Commonwealth vs. Tony Vigliotti. Petition. Sterling, Higbee & Matthews, Attorneys at Law. Filed Aug. 31, 1920.

* * * * * * *

117 COMMONWEALTH OF PENNSYLVANIA,
County of Fayette, ss:

I, Alfred O'Neal, Clerk of Courts in and for said County, do hereby certify that attached hereto are the file papers and a true and correct copy of the Sessions Docket entries of the case of the Commonwealth vs. Tony Vigliotti and Rosi Vigliotti recorded at No. 80, June Sessions, 1920.

In witness whereof I hereunto set my hand and affix my Official Seal, at Uniontown, Pennsylvania, this 17th day of September, 1920.
[SEAL.] (Signed) ALFRED O'NEAL,
Clerk of Courts.

118–119 COUNTY OF ALLEGHENY, *ss:*

The Superior Court of Pennsylvania.

The Commonwealth of Pennsylvania to the Judges of the Court of Quarter Sessions for the County of Fayette, Greeting:

We being willing for certain causes, to be certified of the matter of the Appeal of Tony Vigliotti from the judgment & sentence of your said Court, at No. 80 of June Session, A. D. 1920 wherein Commonwealth is plaintiff and the above appellant is defendant before you, or some of you, depending, do command you, that the record and proceedings aforesaid, with all things touching the same, before the Judges of our Superior Court of Pennsylvania, at a Superior Court to be holden at Pittsburgh, the first Monday of September next, to wit, so full and entire as in your Court before

you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the laws of the State ought.

Witness, the Honorable George B. Orlady, Doctor of Laws, President Judge of our said Superior Court at Pittsburgh, the 31st day of August in the year of our Lord one thousand nine hundred and twenty.

[SEAL.] PIER DANNALS,
Prothonotary.

To the Honorable the Judges of the Superior Court of the Commonwealth of Pennsylvania, sitting at Pittsburgh:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

——— ———. [L. S.]
——— ———. [L. S.]

[Endorsed:] No. 80, June Sess., 1920. No. 76 of April Term, 1921. Superior Court. Commonwealth vs. Tony Vigliotti, Appellant. Certiorari to the Court of Quarter Sessions for the County of Fayette. Returnable the First Monday of September A. D. 1920. Rule on the Appellee, to appear and plead on the Return-day of the Writ. Pier Dannals, Prothonotary. Note.—No application for the allowance of special supersedeas will be considered unless Rule 37 of the Superior Court is strictly complied with. Notice of the above rule is hereby accepted. Wm. A. Miller, District Attorney. Sterling, Higbee & Matthews, Attorneys for Appellant. Filed Sept. 2", 1920. Filed in Superior Court Oct. 11, 1920, Philadelphia.

120–121 EASTERN DISTRICT,
City and County of Philadelphia, ss:

The Supreme Court of Pennsylvania.

The Commonwealth of Pennsylvania to the Judges of the Superior Court, Greeting:

Whereas, Commonwealth of Pennsylvania plaintiff impleaded Tony Vigliotti defendant, in the Court of Quarter Sessions of Fayette County to No. 80 June Sessions 1920, and thereupon it was so proceeded in that judgment was entered in said Court for the said Commonwealth of Pennsylvania and, Whereas, upon appeal to the Superior Court the said judgment was affirmed as of No. 76 April Term, 1921, and Whereas, thereupon, to wit, on the twenty-first day of March, 1921, upon due cause shown, an appeal to this Court was allowed.

Now, Therefore, We being willing to be certified of the matter of the said appeal do command you, that the record and proceedings aforesaid, with all things touching the same, before the Justices

of our Supreme Court of Pennsylvania, at a Supreme Court to be holden at Philadelphia, in and for the Eastern District, the first Monday of May 1921, so full and entire as in your Court before you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable Robert von Moschzisker, Doctor of Laws, Chief Justice of our said Supreme Court, at Philadelphia, the twenty-fourth day of March in the year of our Lord one thousand nine hundred and twenty-one.

[SEAL.] RUDOLPH M. SCHICK,
Prothonotary pro Tem.

To the Honorable the Justices of the Supreme Court of the Commonwealth of Pennsylvania, sitting in and for the Eastern District:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

GEO. B. ORLADY, *P. J.* [L. S.]

[Endorsed:] No. 80, June Sessions, 1920. Q. S. Fayette Co. Superior Court. No. 76, April Term, 1921. No. 456, January Term, 1921. Supreme Court. Commonwealth of Pennsylvania v. Tony Vigliotti, Appellant. Certiorari to the Superior Court Returnable the first Monday of May, 1921. Rule on the Appellee, to appear and plead on the Return-day of the Writ. Rudolph M. Schick, Prothonotary pro Tem. Sterling, Higbee & Matthews, Attorneys for Appellant. Filed in Supreme Court Apr. 4, 1921, Philadelphia.

122 456.

January Term, 1921.

(Q. S. Fayette.)

456.

COMMONWEALTH OF PENNSYLVANIA, Plaintiff,

v.

TONY VIGLIOTTI, Defendant.

Appeal of Defendant.

Superior Court.

No. 76, April Term, 1921, from the judgment affirming the judgment of the Court of Quarter Sessions of Fayette Co., at No. 80, June Sessions, 1920.

Sterling, Higbee & Matthews.

Appeal from Superior Court.

Filed March 24, 1921.

Eo die.—Certiorari exit. Retble. first Monday May 1921.

March 14, 1921.—Petition for allowance of appeal from the Superior Court to Supreme Court filed.

March 21, 1921.—Appeal granted on the single question as to the effect of the Eighteenth Amendment to the Constitution of the United States; hearing fixed for the week of May 2nd, 1921. Per Curiam.

April 4, 1921.—Record returned & filed.

April 29, 1921.—Assignments of Error filed.

May 2, 1921.—Argued.

May 26, 1921.—The judgments appealed from are affirmed, and it is directed that the orders of the Superior Court, contained in its affirmance of these judgments, be forthwith complied with.

Opinion by Moschzisker, C. J.

June 2, 1921.—Petition to retain record filed.

And now, June 2, 1921, the Prothonotary is directed to hold the record in this case until the expiration of a period of thirty days from the date of this order.

R. V. M.,
C. J.

July 1, 1921.—Record to be held twenty additional days, by oral order of Court.

Now July 21, 1921, on motion of counsel for appellant it is ordered that a further extension of time from July 22nd to the 22nd day of August, 1921, be allowed within which to complete appeal to the Supreme Court of the United States.

SIMPSON,
Associate Justice.

July 26, 1921.—Petition for Writ of Error to the Supreme Court of United States, filed.

July 26, 1921.—The application is refused. (See Order filed.) Robt. von Moschzisker, Chief Justice.

August 22, 1921.—Petition for Writ of Error brought into office with the following order attached:

"Allowed, August 16, 1921.

OLIVER WENDELL HOLMES,
Justice Supreme Ct. U. S."

August 22, 1921.—Writ of Error to the Supreme Court of the United States brought into office. Allowed by Hon. Oliver Wendell Holmes, Associate Justice of the Supreme Court of the United States.

August 22, 1921.—Bond for Three Thousand ($3,000) Dollars brought into office. Approved by Hon. Oliver Wendell Holmes, Associate Justice of the Supreme Court of the United States, if satisfactory to his Clerk. Approved also by Hon. Alex. Simpson, Jr., Justice Supreme Court of Penna.

August 22, 1921.—Assignments of Error to the Supreme Court of the United States brought into office.

September 3, 1921.—Citation brought into office, with acceptance of service by Wm. A. Miller, District Atty. for Fayette Co., endorsed thereon.

123 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1921.

No. —.

COMMONWEALTH OF PENNSYLVANIA

vs.

TONY VIGLIOTTI, Appellant.

To the Honorable the Chief Justice and Justices of the Supreme Court of Pennsylvania:

The petition and representation of Tony Vigliotti, Appellant in the case above styled, respectfully presents:

June 9, 1921, he was indicted in the Court of Quarter Sessions of Fayette County at No. 80, June Sessions, 1920, for the offense of

selling liquor without license and selling liquor on Sunday, to which indictment on June 17th, 1920, he pleaded not guilty, which cause was so proceeded in that on that date he was convicted of the offense of selling liquor without a license, and on August 31st, 1920, sentenced to pay a fine and be imprisoned in the Allegheny Workhouse.

From the said sentence he appealed to the Superior Court of Pennsylvania at No. 76, April Term, 1921, which court by its judgment entered March 5th, 1921, affirmed the judgment of the Court of Quarter Sessions of Fayette County from which the Appeal was taken.

The questions presented in the Superior Court, argued and decided by it, are:

124 1. The Act of May 13, 1887, P. L. 108, commonly known as the Brooks Law, is superseded, abrogated and repealed by the 18th Amendment to the Constitution of the United States, which raises a question under the Constitution and Laws of the United States.

2. Evidence obtained by unlawful search and seizure from a defendant is not admissible against him when indicted, which raises a question under the Fourth and Fifth Amendments to the Constitution and Laws of the United States, and Sec. VIII of the Bill of Rights of the Constitution of Pennsylvania.

3. In criminal cases the jury are Judges of the Law, and the fact which raises a question under Section VI of the Bill of Rights of the Constitution of Pennsylvania.

Further questions raised in the said Appeal and decided by the Superior Court adversely to your petitioner are:

1. The Commonwealth in an indictment for selling liquor without a license containing but a single count may not prove more than one separate and distinct sale.

2. That the Court of Quarter Sessions erred in pronouncing sentence upon your petitioner, which sentence was to the Workhouse, and not to the County Jail, as provided in the statute under which he was indicted.

Your petitioner represents that the Superior Court erred in holding that the Brooks Law was so far in force as to sustain a conviction of your petitioner of the offense of selling liquor without a license; in holding that evidence obtained from your petitioner by unlawful search and seizure was admissible evidence against him at the trial of the indictment found against him for the offense
125 for which he was arrested at the time of the unlawful search and seizure; that the Court of Quarter Sessions did not err in refusing to instruct the jury that they were the judges of the law and fact in criminal cases; that evidence of more than one sale was admissible against the defendant, the indictment containing but a single count charging the sale of liquor without license; and that the

Court of Quarter Sessions did not err in sentencing your petitioner to the Workhouse.

Your petitioner attaches hereto a certified copy of the Opinion of the Superior Court herein referred to, and presents herewith a copy of the paper books filed with the Superior Court at the argument of the said cause.

Wherefore, your petitioner prays that he may be permitted to appeal from the judgment of the Superior Court so as aforesaid entered, to the end that the said judgment may be reviewed by your Honorable Court.

And he will ever pray &c.

(Signed) ANTONIO VIGLIOTTI.
TONY VIGLIOTTI.

126 STATE OF PENNSYLVANIA,
County of Fayette, ss:

Tony Vigliotti, the petitioner above named, being duly sworn according to law, doth depose and say that the statements contained in the foregoing petition are true as he verily believes.

(Signed) ANTONIO VIGLIOTTI.
Also written TONY VIGLIOTTI.

Sworn and subscribed before me this 11 day of March, 1921.

[L. SEAL.] CHARLES L. LEWELLYN,
Notary Public.

My commission expires Feb. 8, 1923.

127 In the Superior Court of Pennsylvania, April Term, 1921.

No. 76.

COMMONWEALTH OF PENNSYLVANIA

v.

TONY VIGLIOTTI, Appellant.

Appeal from Q. S. Fayette County.

Filed March 5, 1921.

HENDERSON, *J.:*

The appellant was convicted of selling liquor without a license. The indictment was drawn under the Act of May 13, 1887, P. L. 108. That statute is entitled "An Act to regulate and restrain the sale of vinous, spirituous, malt or brewed liquors or any admixtures thereof." Provision is made therein for the granting by the several courts of quarter sessions, of licenses to sell liquor on compliance with conditions in the act prescribed and subject to the judgment of the court under the evidence as to the fitness of the person or place and necessity for such license. It is provided in the 15th section

that "Any person who shall thereafter be convicted of selling or offering for sale any vinous, spirituous, malt or brewed liquors or any admixtures thereof without a license, shall be sentenced to pay a fine of not less than Five Hundred Dollars nor more than Five Thousand and undergo an imprisonment in the county jail for not less than three months nor more than twelve months." The evidence of the Commonwealth showed that the defendant made sales, in the spring of 1920, of a preparation called "Jamaica Ginger" which contained eighty-eight per cent of alcohol. No evidence was offered by the defendant. It was contended in his behalf, however, at the trial, that the act under which the indictment was drawn was superseded and repealed by the 18th amendment of the Constitution of the United States, and the Act of Congress of October 28, 1919, passed pursuant thereto, prohibiting the manufacture, sale, or transportation of intoxicating liquors as a beverage, within the United States, as a result whereof the Commonwealth is disabled from the enforcement of its statute; and the same question is presented
128 in this appeal. We are to consider therefore the effect of the federal amendment and the act of Congress to enforce prohibition on the legislation of this State regulating the traffic in liquors. It is not to be questioned that prior to the federal amendment the regulation or prohibition of the sale of liquors except as affected by the interstate commerce laws was within the police power of the state; a power not conferred on the Untied States except as incidental to some other power conferred on it by the Constitution: Hamilton v. Kentucky Distilling Companies, 251 U. S. 146; Mugler v. Kansas, 123 U. S. 623. Has this power been taken away by the amendment or merely limited in the scope of its operation? If wholly superseded and annulled that result must be found in the language of the amendment or in the necessary implication arising therefrom. That the first section declaring prohibition is obligatory throughout the United States and therefore renders inoperative every legislative act permitting what the section prohibits may be seen by an inspection of its terms, and this construction was given to it in Rhode Island v. Palmer, 252 U. S. —. In the second section of the amendment it is declared; "The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation." Of the words "concurrent power" it was said in the same opinion that they do not mean joint power or require that legislation thereon to be effective shall be approved or sanctioned by the several states or any of them; nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs. In the ninth conclusion of the opinion referred to the court said: "That power confided to Con-
129 gress by that section while not exclusive, is territorially coextensive with the prohibition of the first section; embraces manufacture and other intra-state transactions as well as importation, exportation and other interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them." When regard is had to the object of

the amendment and the reasonable means to be adopted for its enforcement, the argument seems convincing that the purpose in the use of the words "concurrent power to enforce" was to continue in the several states the authority ther-tofore existing under the police power to establish prohibition, and to confer on the federal government a like power which had not theretofore existed. Congress and the legislatures of the states are placed on the same footing. The word concurrent is used in the sense of existing together, concomitant, operating at the same time along parallel lines toward the accomplishment of the same purpose. If it had been the intention of the people in amending their Constitution to assume exclusive control of the subject, this would have been done by appropriate words or by conferring on Congress exclusive authority to legislate on the subject. By reference to the thirteenth, fourteenth and fifteenth amendments, it will be observed that authority to enforce the provisions thereof is given to Congress alone. The presumption is warranted that the grant of authority in the eighteenth amendment was intended to be different, and that express authority to the states was declared to avoid the controversy so often arising with respect to conflict of authority between the federal and state governments. The purpose was to abolish the use of intoxicating liquor as a beverage and it doubtless occurred to the minds of the
130 framers of the amendment that this could be more expeditiously, economically and successfully accomplished if the federal government and the states co-operate to that end. There is thus left to the states the same police power with respect to liquors which theretofore existed, subject however to the prohibitions of the amendment. We are constrained to hold therefore that the authority conferred on Congress by the eighteenth amendment is not exclusive and that by the express language of the amendment like authority of enforcement resides in the several states. Such authority must not be exercised in antagonism to the legislation of the Congress on the subject, but within the limitations indicated it is a lawful power effective to enforce state legislation having for its object the suppression of the traffic in spirituous, vinous and malt liquors or admixtures thereof.

If the "concurrent power" referred to is something less than or different from, the giving of like power to the federal government and the several states to act with respect to the prohibition thereby established, it does not necessarily follow that the state is disabled from legislating against the manufacture, sale and transportation of liquors. The authority of the states to legislate on subjects with respect to which Congress has power, has been recognized in many cases. It was held in Gilman v. Phila., 3 Wallace 713: "The states may exercise concurrent or independent power in all cases but three: (1) Where the power is lodged exclusively in the federal constitution; (2) Where it is given to the United States and prohibited to the States; (3) Where from the nature and subjects of the power it must necessarily be exercised by the national government"; and as applied to the police power the court said in Reid v. Colorado, 187

U. S. 137: "It should never be held that Congress intends to
131 supersede or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifest. This court has said—and the principle has been often re-affirmed—that in the application of this principle of the supremancy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive so that the two could not be reconciled or consistently stand together." This case involved the validity of a state law providing for the inspection of live stock coming into the state from other states. It affected interstate commerce therefore and applied to live stock which had been inspected in accordance with an act of Congress. The authority of the state to enact and enforce the statute was upheld. The subject is considered at length in: Fox v. Ohio, 5 Howard 410; Linnot v. Davenport, 22 Howard 227; Ex Parte Siebold, 100 U. S. 371; Southern Railway v. Indiana, 236 U. S. 439 and Sexton v. California, 189 U. S. 319, are authorities bearing on the same subject. In the light of the principle declared in the cases cited, it may be confidently held that in the absence of an express grant of concurrent authority to the State, it was not restrained by the amendment from the exercise of the police power not necessarily inconsistent therewith.

The concurrent power conferred by the second section of the amendment is to enforce the article by "appropriate legislation." The defendant having been indicted under a statute existing prior to the adoption of the amendment it becomes necessary to ascertain to what extent this legislation is affected by the amendment and to inquire whether any part of it is in force and "appropriate" within the meaning of the Constitution. There can be no doubt of
132 the capacity of the legislature to enact the law on which the indictment rests. There was adequate warrant in the police power for all that was then enacted. The title of the statute is "to restrain and regulate" the sale of vinous, stirituous, malt or brewed liquors or any admixtures thereof. In the first section it is declared to be unlawful to keep or maintain any house, room or place, hotel, inn, or tavern where any vinous, spirituous, malt or brewed liquors or any admixtures thereof are sold by retail except a license therefor shall have been previously obtained as hereinafter provided. Subsequent sections prescribed the conditions under which licenses to sell liquors at retail may be granted by the courts of quarter sessions of the respective counties. The fifteenth section declares that any person who shall be convicted of selling or offering for sale any vinous, spirituous, malt or brewed liquors or any admixtures thereof without a license shall be sentenced to pay a fine of not less than five hundred dollars nor more than five thousand and undergo an imprisonment in the county jail of not less than three months nor more than twelve months. It is declared unlawful in the seventeenth section for any person with or without license to furnish by sale, gift or otherwise to any person any spirituous, vinous, malt or brewed liquors on any day that elections may now or hereafter be

required to be held, nor on Sundays, nor at any time to a minor or a person of known intemperate habits, or a person visibly affected by intoxicating drink, either for his or her use or for the use of any other person, nor to sell or furnish liquors to any person on a pass book or order on a store, or to receive from any person, goods, wares, merchandise or provisions in exchange for liquors, and penalties are provided for such prohibited acts. It is evident that the pro-
133 hibition of the sale of liquor is one of the important objects of this legislation. Restraint of the business was one of the purposes declared in the title, and the numerous prohibitive provisions and the restrictions with respect to the granting of licenses show that it was the intention to exclude the many from participation in the business and grant to the few the privilege of selling under restricted and supervised conditions. All of the citizens of the Commonwealth, except the small number who might receive licenses, are forbidden to sell. The right to sell was the exception, and in the case of an indictment for selling without license, the burden is on the defendant to show the authority under which he acted: Com. v. Wenzel, 24 Pa. Superior Ct. 467. It should also be observed that the statute provides that "it shall not be held to authorize the sale of liquors in any city, county, borough or township having special prohibitory laws." It was a statute of restraint not of enlargement of the right to sell liquors and is the last of a succession of enactments on that subject covering the whole history of the Commonwealth and indicating a steady advance toward the suppression of the business. It was not necessary under the act that all licenses be granted. On the contrary it was within the discretion of the Courts to refuse all when in the opinion of the court such licenses were not necessary "for the accommodation of the public and entertainment of strangers or travellers." In an important sense therefore it was a prohibitory law. It is contended, however, that the provision for the granting of licenses is inseparably connected with the other provisions of the act and that the legislature would not have enacted the law without its license provisions.

It may be conceded that the legislature intended that some
134 licenses should be granted, at least the authority to so act was vested in the discretion of the courts of quarter sessions, but the legislative intent is not a determining fact in the consideration of the question before us. That question is: Did the adoption of the amendment to the Constitution abrogate all the law of the state relating to the vending of liquors? Here is a statute the integrity and vitality of which could not have been questioned prior to the change in the federal constitution. It had two purposes, to permit the granting of licenses to sell to some persons, and to forbid all other persons from dealing in their merchandise described. It is obvious that the amendment supersedes as much of the law of the state as permits the granting of licenses to sell intoxicating liquors for beverage purposes. What constitutes intoxicating liquors is not defined in the amendment, but pursuant to the authority conferred on it, the Congress has declared what shall be embraced within that category by the adoption of the Act of October 28, 1919, commonly

called the Volstead Act. Under this legislation, beverages containing one half of one per cent of alcohol are intoxicating liquors. It will be noticed that the prohibition in the statute of the State is not against "intoxicating liquors" to be used for "beverage purposes" as in the federal amendment, but against the sale or offering for sale of any vinous, spirituous, malt or brewed liquors or admixtures thereof. The federal legislation does not go to the same extent as that of the State, with reference to the subjects of prohibition. Under the former, intoxicating liquors for beverage purposes having an alcoholic content of one half of one per cent or more are the subjects of prohibition. While in this s-ate prohibition as has been seen is against vinous, spirituous, malt or brewed liquors or admixtures thereof without reference to the quantity of alcohol
135 contained therein and irrespective of the question whether they are to be used as a beverage. It is not important in this S-ate whether the thing sold or offered for sale is intoxicating or not so long as it comes within any of the classes named in the statute: Hatfield v. Com., 120 Pa. 395; Com. v. Reyburg, 122 Pa. 299; Com. v. Burns, 38 Pa. Superior Ct., 514; Ruppert v. Caffey, 251 U. S. 264. The State statute is not directed against the manufacture and transportation of liquors, while the eighteenth amendment and the prohibitory law passed pursuant thereto apply to both of these. It will be seen that none of the prohibitions of the act of Congress are in conflict with the prohibitory provisions of the act of the legislature of 1887. We have then a situation in which the amendment of the Constitution renders invalid a part of the statute of this State but is in entire harmony with another part thereof. Is the part which is not in conflict with the federal law self-sustaining and capable of enforcement? In our opinion so much of the act of this State as prohibits the sale of liquor is still in force. It cannot be questioned that the legislature might have repealed the provisions of the Act of 1887 authorizing the granting of licenses leaving in force the prohibitory provisions thereof, and if this might have been done, why is not the same result accomplished by the paramount authority of the amended Constitution? The effect of that instrument is to invalidate all State laws inconsistent therewith, but it does not operate on any legislation compatible therewith. We regard the Act of 1887 as legislation on two subjects clearly distinguished, the granting of licenses to sell, and prohibition of sale by persons not licensed. If the authority to license is removed, we see no necessity for holding that permission to sell without
136 license is affected. This we think is contrary to the express terms of the second section of the amendment and to the implied power existing in the State irrespective of such express permission, and having in view the terms and objects of the State statute, it seems evident that its provisions with respect to license are not so dependent on and interlocked with its prohibitory provisions that the authority to grant licenses cannot be abrogated without at the same time overthrowing its prohibitory features. Is the Act of 1887 "appropriate legislation" within the meaning of the second

section of the Amendment? Nothing in the amendment or the act of Congress passed for *for* its enforcement requires us to hold that appropriate legislation must be a statute enacted after the adoption of the constitutional amendment. Existing laws may be as appropriate as those subsequently passed to accomplish the objects. It would be a vain thing to require the states in which the prohibition of the sale of liquor was in force at the time of the adoption of the amendment to re-enact their laws on the subject, and if the prohibitive provisions of the statute of this State are sufficient in terms for that purpose we are unable to find a convincing reason why they should not be held to be appropriate for the purpose contemplated: In re Van Vliet, 43 Fed. Rep. 761; Com. v. Nickerson, Mass. The act of Congress is a remedial enactment and should be liberally construed and the advancement of the remedy should be promoted by any construction which can consistently be put on it. To hold otherwise would give a narrow interpretation, the effect of which would be to greatly restrict the means by which the objects of the amendment are to be accomplished. It is not necessary that such legislation be identical in terms with that adopted by the United States. If the object is the same, if its enforcement
137 tends to accomplish that which the federal legislation undertakes to do and is in no way inconsistent with or contradictory of the federal law, it is appropriate and may be enforced. Our conclusions are, therefore: (1) That by operation of the eighteenth amendment of the federal Constitution and the enactment of the federal prohibitory law by Congress, so much of the Act of May 13, 1887, of this state as authorizes the sale of intoxicating liquor, containing one half of one per cent or more of alcohol, as a beverage, is rendered invalid; (2) That the part of the Act of May 13, 1887, which prohibits the sale of the liquors described in the eighteenth amendment and the legislation of Congress in enforcement thereof is in force and unaffected by the amendment; (3) That the part of the Act of May 13, 1887, which is not invalidated by the eighteenth amendment and the national prohibition law is effective existing legislation; (4) That it is appropriate legislation under the second section of the eighteenth amendment.

When the defendants were arrested the officer who had the warrant took from the premises of the accused a considerable quantity of liquor which was offered in evidence at the trial. This was objected to on the ground that the possession of the exhibit was obtained in violation of the fourth amendment of the Constitution of the United States and the eighth section of the Bill of Rights of Pennsylvania which prohibit unreasonable searches and seizures, and the appellant complains that this objection was overruled. The reason assigned was not sufficient to justify the court in excluding the offer. Conceding that the packages were taken from the store and residence of the defendants without authority, the admissibility of the evidence is not affected by the illegality of the means
138 through which it was obtained. The court will not suspend the conduct of a trial to enter into a collateral inquiry as to the means through which the evidence, otherwise competent, was

obtained. If a wrong was done the owner, his remedy is in a different form; Adams v. New York, 192 U. S. 594; Com. v. Dana, 2 Metcalf 329; Cluet v. Rosenthal, 100 Mich. 193; 1 Greenleaf's Evidence, section 254; 3 Wigmore on Evidence, section 2183.

Exception is taken to the answer of the court to the defendants' sixth point as set forth in the twenty-fourth assignment of error. The point was "in this case the jury are the judges of the law and the facts." The court's answer was: "Counsel have asked for a categorical answer to this point. In our judgment the defendants are not entitled to an affirmation of the request without explanation or qualification. The best evidence the jurors have of the law is the instructions of the court. It is our duty to declare the law to them and it is their duty to accept it when so declared. The point is therefore refused." Taking the whole of the answer into consideration it is evident that the concluding sentence related to what the court referred to as a request for a "categorical answer" to the point and was not intended as an instruction to the jury that they were not authorized to dispose of the case on the law and the evidence. The caution of the court probably arose out of the legal difficulties in the case from the nature of the defense presented by the learned counsel for the appellant. The principal question discussed before the court, and in the brief and oral argument on the appeal, was that relating to the effect of the adoption of the eighteenth amendment to the Constitution on the law of Pennsylvania regulating the sale of liquor. That was a subject with which
139 the jury was doubtless not familiar. It was new to the Courts and Bar of the State. When the Court said the defendants were not entitled to the affirmation of their point without explanation or qualification he was in harmony with the decisions in Com. v. McManus, 143 Pa. 64; Com. v. Bednorciki, 264 Pa. 124. In the latter case the court charged: "You are the judges of the facts as I have tried to explain to you and it is my duty to declare to you the law." In sustaining this part of the charge Justice Walling said: "The latter clause is criticised, but unjustly so. It is the duty of the trial judge to declare the law to the jury in every criminal case and particularly in a homicide case: Meyers v. Com. 83 Pa. 181; and Com. v. Smith, 221 Pa. 552. The best evidence the jurors have of the law is the instructions of the court. Of course they can render a general verdict of not guilty and to that extent are ultimately the judges of both the law and the facts; but that does not absolve the court from doing its duty of declaring the law to them nor absolve them from the duty of accepting it when so declared." The answer of the trial judge is a qualification of the point and did not mislead the jury, for the question of the guilt or innocence of the defendants was submitted to the jury in a manner not objected to. In Com. v. McManus a similar point was answered substantially in the same way. The jury was instructed that the statement of the law by the court was the best evidence of the law within the jury's reach, and that the jury was to be guided by what the court had stated with reference to the law, and this was said to be an accurate and carefully considered answer to the point.

In the ninth assignment error is alleged in the admission of evidence of more than one particular act of selling under each
140 count in the indictment. This objection is not sustained. The practice is well established to permit the introduction of evidence of other acts than those charged in the indictment when such acts are of like character and were reasonably close as to time with the act charged in the indic-ment. Where the offense is a carrying on of business forbidden by law, or where a license is required by statute, and the defendant is tried for a violation thereof, it is admissible to prove the method of doing business to show the motive, purpose and guilty knowledge of the defendant: Com. v. McDermott, 37 Pa. Superior Ct. 1, and authorities there cited.

The offer of evidence covered by the twelfth and thirteenth assignment- was competent. It was of like character with other evidence introduced in the case. The question of the identification of the package was one relating to the weight of the evidence, but not affecting its competency. Moreover it was of slight consequence. Evidence of sales was clear and conclusive. No testimony was offered by the defendants and the admission or exclusion of this evidence would have produced no change in the verdict. The evidence of the intoxicating effect of the thing sold was admissible: Com. v. Reyburg, 120 Pa. 305; 1 Wigmore on Evidence, page 554. The admission as evidence of large quantities of like character as the article sold found on the premises of the defendants was proper. It bore on the kind of business conducted by the defendants with respect to the charge in the indictment and on the question of intent and guilty knowledge. The jury might have believed the quantity found to be out of all proportion to the demands of a legitimate trade in Jamaica Ginger, and in connection with other evidence in the case as to quantities sold to particular individuals and alcoholic content it supported the Commonwealth's contention that the defendants were engaged as a business in the unlawful sale of spirituous liquors; Com. v. Johnson, 5 Pa. Superior Ct. 585.

We do not find support for any of the assignments of error. They are therefore overruled and the judgment is affirmed and the record remitted to the court below. And it is ordered that the defendant appear in that court at such time as he may be there called, and that he be by that court committed until he has complied with the sentence or any part of it which had not been performed at the time the appeal in this case was made a supersedeas.

141 COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

I, Pier Dannals, Prothonotary of the Superior Court of Pennsylvania, sitting at Pittsburgh, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire opinion in the case of Commonwealth vs. Tony Vigliotti, Appellant at No. 76 April Term, 1921 as full, entire and complete as the same remains on file in the said Superior Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said

cause in my keeping and custody as the Prothonotary of said Court, that the foregoing is a correct transcript from said record and of the whole of the original thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Pittsburgh, in the County of Allegheny, sitting at Pittsburgh, as aforesaid, this 8th day of March in the year of our Lord One Thousand Nine Hundred and twenty-one.

[L. SEAL.] (Signed) PIER DANNALS,
Prothonotary.

Endorsement: No. 76. April Term, 1921. Commonwealth v. Tony Vigiliotti, Appellant. Exemplification.

142 Endorsement: Page 347. In the Supreme Court of Pennsylvania, Eastern District, No. 456, January Term, 1921. Commonwealth of Pennsylvania vs. Tony Vigliotti, Appellant. Petition for Leave to Appeal from Superior Court. March 21, 1921. Appeal granted on the single question as to the effect of the Eighteenth Amendment to the Constitution of the United States; hearing fixed for the week of May 2nd, 1921. Per Curiam. Filed in Supreme Court Mar. 14, 1921, Philadelphia. Sterling, Higbee & Matthews, Attorneys-at-law, Uniontown and Connellsville, Pa.

143 In the Supreme Court of Pennsylvania for the Eastern District.

Superior Court of Pennsylvania, Sitting at Pittsburgh, April Term, 1921.

No. 76.

COMMONWEALTH OF PENNSYLVANIA

vs.

TONY VIGLIOTTI, Appellant.

Enter appeal on behalf of Tony Vigliotti from the judgment of the Superior Court of Pennsylvania, sitting at Pittsburgh, as per order of Supreme Court, allowing said Appeal, filed 21st day of March, 1921.

To Rudolph M. Schick, Acting Proth'y Sup. Ct., E. D.

(Signed) STERLING, HIGBEE & MATTHEWS,
Attorneys for Appellant.

COUNTY OF FAYETTE, *ss:*

E. C. Higbee, Attorney, being duly sworn, saith that the above Appeal is not intended for delay, but because Appellant believes he has suffered injustice by the judgment from which he appeals.

E. C. HIGBEE.

Sworn and subscribed before me, this 23 day of March A. D. 1921.

[L. SEAL.] CHARLES L. LEWELLYN,
Notary Public.

My commission expires Feb. 8, 1923.

[Endorsed:] No. 456, January Term, 1921. Supreme Court of Pennsylvania, Eastern District. Commonwealth of Pennsylvania vs. Tony Vigliotti, Appellant. Appeal and Affidavit. Filed in Supreme Court Ma. 24, 1921, Philadelphia. Sterling, Higbee & Matthews, Attorney- for Appellant.

144 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1921.

No. 456.

COMMONWEALTH OF PENNSYLVANIA

vs.

TONY VIGLIOTTI, Appellant.

Comes now Tony Vigliotti, the Appellant, by his attorneys, and files the following:

Assignments of Error.

1.

The Superior Court erred in overruling the first Assignment of Error, which assignment and the order of the Superior Court overruling it are as follows:

The Court erred in overruling defendants' motion in arrest of judgment, which motion, the ruling of the court, and the defendants' exception are as follows:

"Come now the defendants, Tony Vigliotti and Rosi Vigliotti, by their attorneys, and move that judgment be arrested, and in support of such motion say:

1. The first count in the indictment upon which the defendants were convicted by the jury is drawn under Section 15 of the Act of May the 13th, 1887, P. L. 113, commonly called the "Brooks Law," and is superseded and repealed by the 18th amendment to the constitution of the United States, ratified January 20, 1919, and the Act of Congress adopted in pursuance thereof, commonly known as the Volstead Act.

2. Section 15 of the Brooks Act is not an exercise by the State of Pennsylvania of its authority under the 18th amendment to the constitution of the United States to enact appropriate legislation for enforcing the prohibitions ordained by that amendment.

3. The State of Pennsylvania has not enacted any appropriate legislation to enforce the prohibitions of the 18th amendment to the constitution of the United States.

4. The first count of the bill of indictment does not charge an indictable offense."

145 And now, August 10, 1920, after argument and consideration, the motions in arrest of judgment and for a new trial are overruled and dismissed. By the Court."

"September —, 1920, defendants except to the order of court overruling their motion in arrest of judgment, and at their instance bill sealed. E. H. Reppert, J."

Order of Superior Court.

We do not find support for any of the assignments of error. They are therefore overruled and the judgment is affirmed and the record remitted to the court below. And it is ordered that the defendant appear in that court at such time as he may be there called and that he be by that court committed until he has complied with the sentence or any part of it which had not been performed at the time the appeal in his case was made a supersedeas.

2.

The Superior Court erred in overruling the second assignment of error, which assignment and the order of the Superior Court overruling it are as follows:

The court erred in answering defendants' first point, which point, the answer of the court, and defendants' exception are as follows:

1. "Under all the evidence, the defendants cannot be convicted. Answer: Refused."

"And now June 17, 1920, defendants by their counsel except to the answers of the court to the foregoing points, and at their instance bill sealed."

Order of Superior Court.

We do not find support for any of the assignments of error. They are therefore overruled and the judgment is affirmed and the
146 record remitted to the court below. And it is ordered that the defendant appear in that court at such time as he may be there called and that he be by that court committed until he has complied with the sentence or any part of it which had not been performed at the time the appeal in his case was made a supersedeas.

3.

The Superior Court erred in overruling the third assignment of error, which assignment and the order of the Superior Court overruling it are as follows:

The court erred in answering defendants' second point, which point, the answer of the court, and defendants' exception are as follows:

"Under all the evidence, there can be no conviction of the defendant, Tony Vigliotti, on the first count of the indictment. Answer Refused."

"And now June 17, 1920, the defendants by their counsel except to the answers of the court to the foregoing points and at their instance bill sealed."

Order of Superior Court.

We do not find support for any of the assignments of error. They are therefore overruled and the judgment is affirmed and the record remitted to the court below. And it is ordered that the defendant appear in that court at such time as he may be there called, and that he be by that court committed until he has complied with the sentence or any part of it which had not been performed at the time the appeal in this case was made a supersedeas.

4.

The Superior Court erred in overruling the fourth assignment of error, which assignment and the order of the Superior Court
147 overruling it are as follows:

The court erred in answering defendants' third point, which point, the answer of the court, and defendants' exception are as follows:

"Under all the evidence, there can be no conviction of the defendant, Rosi Vigiliotti, on the first count of the indictment. Answer: Refused."

And now June 17, 1920, defendants by their counsel except to the answers of the court to the foregoing points, and at their instance bill sealed."

Order of Superior Court.

We do not find support for any of the assignments of error. They are therefore overruled and the judgment is affirmed and the record remitted to the court below. And it is ordered that the defendant appear in that court at such time as he may be there called and that he be by that court committed until he has complied with the sentence or any part of it which had not been performed at the time the appeal in his case was made a supersedeas.

5.

The Superior Court erred in entering the following judgment in the appeal of Tony Vigliotti.

We do not find support for any of the assignments of errors. They are therefore overruled and the judgment is affirmed and the record remitted to the court below. And it is ordered that the defendant appear in that court at such time as he may be there call-d, and that he be by that court committed until he has complied with the sentence or any part of it which had not been performed at the time the appeal in this case was made a supersedeas.

STERLING, HIGBEE & MATTHEWS,
Attorneys for Appellant.

Endorsement: In the Supreme Court of Pennsylvania, Eastern District. No. 456, January Term, 1921. Commonwealth of Pennsylvania v. Tony Vigliotti, Appellant. Assignments of Error. Filed in Supreme Court Apr. 29, 1921, Philadelphia.

148 4000.

In the Supreme Court of Pennsylvania, Eastern District.

Nos. 456 to 462, Inclusive, January Term, 1921, and No. 42, January Term, 1922.

COMMONWEALTH OF PENNSYLVANIA

v.

TONY VIGLIOTTI and Seven Other Defendants.

Appeals by 8 Defendants from Judgments of the Court of Quarter Sessions of Fayette County.

MOSCHZISKER, *C. J.*:

The several defendants at bar were convicted at a time subsequent to the date of the 18th Amendment of the Constitution of the United States and after the Act of Congress passed for its enforcement. The question involved is, Do these Federal laws annul the state law under which defendants were indicted for selling liquor without a license?

The Pennsylvania Act of May 13, 1887, P. L. 108, called the Brooks Law, is entitled "An act to restrain and regulate the sale of vinous and spirituous, malt or brewed liquors, or any admixtures thereof." Any liquor containing distilled alcohol is spirituous; all having alcohol as a result of fermentation are vinous, and those with alcohol produced by artificial processes, such as the brewing of beer, come within the malt or brewed class; these, together, are generally supposed to include about all kinds of beverages containing even a trace of alcohol.

The Brooks Law has nineteen sections, and neither the term "intoxicating liquors" nor its equivalent is found in any of them till we reach the 4th, which makes it the duty of constables to return all places, "licensed and unlicensed," that are "engaged in selling

intoxicating liquors;" then the 16th section renders it unnecessary for druggists to obtain a license under the statute, but provides "they shall not sell intoxicating liquors except upon the written prescription of a regularly registered physician," and "any person who shall wilfully prescribe any intoxicating liquors as a beverage to
149 persons of known intemperate habits shall be guilty of a misdemeanor." These provisions, together with a prohibition, in the 17th section, against selling to persons visibly affected by "intoxicating drink," are absolutely the only references in the statute to "intoxicating liquors," and it will be observed that none of them have to do with defining the kinds of liquors comprehended by the licenses which this legislation requires. In fact we early decided that the liquors referred to in the licensing parts of the Act of 1887 need not have an "intoxicating quality:" see Com. v. Reyburg, 122 Pa. 299, 304.

The sale of such liquors was permitted under the Brooks Law, because, and simply because, not forbidden; although there can be no doubt it was intended to be permitted to the limited extent there tacitly allowed.

The statute in question was put upon the books at a time when strict prohibition was being agitated in the State, the same legislature which passed it formulating a constitutional amendment to that end, for submission to the people (1887, P. L. 414); and it may well be the thought was in the minds of the law makers that not only did this piece of legislation (the Brooks Law) serve then present purposes, but it would fit the situation, till a better instrument could be devised, in the event of prohibition coming to pass. At least this suggestion is warranted, not only by the significant absence from the act of the term "intoxicating liquors," in connection with the license system there ordained (such term or an equivalent being rather generally used in the earlier Pennsylvania liquor laws), but also by the whole structure of the statute; for it is so drawn that, by the elimination,—through subsequent legislation or otherwise,—of the possibility of intoxicating liquors being sold thereunder, its terms would admirably suit the control of the business of dealing in those kinds of liquors which most readily may become of the intoxicating class, or those liquors under the guise of which intoxicating beverages can be most easily trafficed in. This course,—that is, a well regulated license system, to govern the general supply and distribution of all liquors of the character just described,—in the view of many thoughtful people, is consid-
150 ered one of the very best aids to efficient control, and, through such control, actual enforcement of practical prohibition. In this connection, witness the series of amendments made to the Brooks Law by our last legislature, which still retain the license plan.

When looked at from the standpoint we have indicated, there is nothing in the Pennsylvania Act so inconsistent with the 18th Amendment to the Constitution of the United States (which reads thus: "Section 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from

the United States and all territory subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited. Section 2. The Congress and several states shall have concurrent power to enforce this article by appropriate legislation."), or to the Act of Congress passed October 28, 1919, called the Volstead Act (which prohibits liquors for beverage purposes that contain one half of one per cent of alcohol or more), as to require us to hold our statute annulled by the federal law.

The police power of the sovereign Commonwealth of Pennsylvania remains unimpaired, so far as the right to protect its citizens, in its own way, from the evil effects of intoxicating liquors is concerned, except, of course, that, since the 18th Amendment, under no statute may it permit the sale, use or possession of liquors of a kind or in a manner prohibited by the federal law. Aside from these limitations, all our acts of assembly stand, which are not inconsistent with the amendment and cognate federal statutes, and, as already stated, the Act of 1887 cannot be thus classed; any of its provisions in conflict with the federal law are annulled, but, as the prevailing scheme of the statute and the parts thereof under which the indictments at bar were drawn, are not so in conflict, the act as properly held to be in force for present purposes.

The nearest analogy within our own law on the point of concurrent exercise of the police power, which at all approximates the situation presented by the new National law and the previously enacted laws of the several States, so far as the effect of the former upon the latter is concerned, is that shown by the early regulations, governing automobiles upon the highways of this State, at a time when local jurisdiction in that field was very generally permitted by the Commonwealth to its several political subdivisions. In Brazier v. Phila., 215 Pa. 297, 300, 301, while conceding "the paramount authority of the law making power of the State" over that of any one of its cities, just as here, since the 18th Amendment, on the subject there dealt with, like paramount authority must be conceded to the National government, over any one of the States, speaking of the effect, upon a local automobile regulatory ordinance, of a subsequently enacted general law, providing "State regulations for use of automobiles," we held that, notwithstanding the enactment of the general law by the paramount authority, the ordinance stood intact, since the latter was "not inconsistent" with the former and was "adapted" to carry out its purpose. On the same theory, but, as this is a sovereign State, with stronger grounds of support, we conclude that the Brooks Law still survives, as Pennsylvania's own police power method of officially listing and adequately controlling the customary sources of general supply and distribution, to the peoples within her borders, of those kinds of liquors among which intoxicating beverages are usually found, and she may thus assist in prohibiting their illegal use as such; although, of course, not intended for that precise purpose, the statute is adapted to serve as an instrument with which to perform, at least in part, this State's right and obligation to enforce, "by appropriate legislation," the 18th Amendment.

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If the Brooks Law had been written for the express or prime purpose of deriving revenue from, licensing the sale, and regulating and encouraging the use of, intoxicating liquors, as appellants seem to think, and all the numerous features therein of a strictly prohibitory nature, of which there are many, were subordinate to what they take to be its real purpose, then it might well be said there was such incompatibility between it and the 18th Amendment
152 that the two could not stand together; but, as we have shown, this is not the case. On the contrary, while the Brooks Law recognizes the existence of intoxicating liquors, and, by not forbidding, tacitly permits their sale and use, its whole tenor is one of restraint against the recognized evils which flow therefrom, and, as previously said, so far as the licensing features of the act are concerned, the scheme of the statute is to regulate the direct distribution to the people not of intoxicating liquors but of those kinds of liquors among which the former is usually found, and thus to control such distribution for the enforcement of laws regulating the actual use of intoxicating liquors, no matter what, from time to time, these laws may prove to be. If man were so constituted that legally ordained prohibition would, in and of itself, universally restrain his appetite for strong drink, after the 18th Amendment, no such regulation would seem necessary, but, unfortunately, he is not, and of this fact we take judicial notice; since the normal appetite for vinous, spirituous, malt and brewed liquors of an intoxicating nature still continues, and, so far as we can see, will continue to continue for some time to come, and since those beverages, whether intoxicating or not, very largely constitute the drink of the people, it is obvious that a statute such as the Pennsylvania Acts of 1887, requiring all dealers in the kinds of liquors just named to be licensed, and strictly regulating the trade therein, by thus making it possible to keep a close watch over the character of men who are given a license and over their conduct after the privilege is granted, is capable of serving a useful purpose in preventing the illicit distribution to the people of intoxicating drink by those in control of the usual sources of beverage supply. To this extent at least, it is adapted to present conditions, and therefore not in conflict with the new laws which brought about those conditions.

The Pennsylvania plan may prove entirely adequate to the occasion, or, as some predict, it may prove practically inadequate, but these are matters of fact with which we have naught to do; of its legal sufficiency, as a piece of subsisting legislation, which
153–168 is neither inconsistent with nor antagonistic to the recently ordained federal law, this court, for the reasons already given, entertains no doubt, and that is all we are charged to pass upon.

Many decisions, relating to the general subject in hand, have been cited to us by counsel on both sides. Some of these, from other states, uphold their existing liquor laws, while others decide to the contrary (the cases in question, together with the relevant United States Supreme Court decisions, will be mentioned by the Reporter in his notes published in connection herewith); but, since this court

views the matter from a somewhat different angle than that taken by the courts of the other states, under their respective acts of assembly, which, perhaps radically differ from our own, we think no useful purpose would be served by discussion of these outside decisions; nor, from our point of view, is it necessary to discuss, further, appellant's contentions against the positions taken by the Superior Court of this state in deciding the present controversies,—it is sufficient to say that we find no error in the ultimate conclusions of that tribunal, represented by its determinations of the several cases now before us for review.

The judgments appealed from are affirmed, and it is directed that the orders of the Superior Court, contained in its affirmance of these judgments, be forthwith complied with.

Endorsed: Nos. 456 to 462 inclusive, January Term, 1921, and No. 42, January Term, 1922. Commonwealth of Pennsylvania v. Tony Vigliotti and seven other defendants. Appeals by 8 defendants from judgments of the Court of Quarter Sessions of Fayette County. Argued May 2, 1921. Judgments affirmed. Moschzisker, C. J. Filed in Supreme Court May 26, 1921, Middle District.

* * * * * * *

169 In the Supreme Court of the United States.

No. —.

TONY VIGLIOTTI, Plaintiff in Error,

vs.

COMMONWEALTH OF PENNSYLVANIA, Defendant in Error.

Application for Writ of Error.

To the Honorable the Chief Justice and Justices of the Supreme Court of the United States:

The petition and representation of Tony Vigliotti, Plaintiff in Error, respectfully presents:

He was indicted June 9, 1920, in the Court of Quarter Sessions of Fayette County, Pennsylvania at No. 80, June Sessions, 1920, on the charge of selling liquor without a license, for acts done and committed within the sixty days next preceding April 3, 1920.

To the said indictment he pleaded not guilty, whereupon, a trial was had and a verdict returned finding him guilty of the said offense.

The indictment was drawn under a statute of Pennsylvania, approved May 13, 1887, commonly called the Brooks Law, (Pamphlet Laws of 1887, page 108), entitled: "An act to regulate and restrain the sale of vinous, spirituous, malt or brewed liquors, or any admixture thereof."

170 The particular part of the statute under which the indictment was drawn (Section 15) is as follows:

"Any person who shall hereafter be convicted of selling or offering for sale any vinous, spirituous, malt or brewed liquors, or any admixture thereof, without a license, shall be sentenced to pay a fine of not less than five hundred dollars, nor more than five thousand dollars, and undergo an imprisonment in the county jail of not less than three months, nor more than twelve months."

Before pleading, your petitioner moved to quash the indictment and after verdict and before sentence moved in arrest of judgment, assigning as reasons in support of each motion that the said statute under which the indictment was drawn was repealed and superseded by the Eighteenth Amendment to the Constitution of the United States, and the act of Congress known as the Volstead Act, enacted to carry the amendment into effect, each of which motions were refused by the trial court and your petitioner sentenced.

During the course of the trial, your petitioner by appropriate requests for instructions to the jury raised the same questions, which were ruled adversely by the trial court.

After sentence your petitioner appealed to the Superior Court of Pennsylvania at No. 76, April Term, 1921, which court on March 5, 1921, affirmed the judgment of the Court of Quarter Sessions of Fayette County. From the judgment of the Superior Court your petitioner appealed to the Supreme Court of Pennsylvania at No. 456, January Term, 1921, which court on the 26th day of
171 May, 1921, affirmed the judgment of the Superior Court.

Your petitioner represents that the Supreme Court of Pennsylvania erred in the respects set forth in the assignments of error filed herewith.

The Supreme Court of Pennsylvania is the court of last resort of that state and under the law of the state your petitioner has no right to appeal to any other court.

There is drawn in question by the decision of the Supreme Court of Pennsylvania the validity of a statute of a state on the ground of its being repugnant to the Constitution and Laws of the United States, and the decision of the Supreme Court of Pennsylvania is in favor of the validity of the statute.

Your petitioner files herewith a copy of the record in the said cause before your Honorable Court for the purposes of reviewing sylvania.

Your petitioner is advised and believes that the question thus raised has not heretofore been passed upon by your Honorable Court.

Wherefore, your petitioner prays that a writ of error be directed to issue to the Supreme Court of Pennsylvania to bring the said cause before your Honorable Court for the purpose of reviewing agreeably to the Act of Congress in such case made and provided.

And he will ever pray &c.

TONY VIGLIOTTI.
E. C. HIGBEE,
Attorney.
FRANK DAVIS, JR.,
Attorney.

172 STATE OF PENNSYLVANIA,
County of Fayette, ss:

Tony Vigliotti, the plaintiff in error, being duly sworn according to law, doth depose and say that the statements contained in the foregoing petition are true and correct.

TONY VIGLIOTTI.

Sworn and subscribed before me this 12 day of Aug., 1921.

[Seal Charles L. Lewellyn, Notary Public, Uniontown, Pa.]

CHARLES L. LEWELLYN,
Notary Public.

My commission expires Feb. 8, 1923.

Allowed, August 16, 1921.
OLIVER WENDELL HOLMES,
Justice Sup. Ct. U. S.

[Endorsed:] Tony Vigliotti, Plaintiff in error, vs. Commonwealth of Pennsylvania, Defendant in error. Application for Writ of Error. Filed in Supreme Court Aug. 22, 1921, Philadelphia.

173 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Tony Vigliotti and The Commonwealth of Pennsylvania wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties,
174 or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said Tony Vigliotti as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings

aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 16th day of August, in the year of our Lord one thousand nine hundred and twenty-one.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States,
By WM. R. STANSBURY,
Deputy.

Allowed by
OLIVER WENDELL HOLMES,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States, October Term, 191–. Tony Vigliotti, Plaintiff in Error, vs. Commonwealth of Pennsylvania, Defendant in Error. Writ of Error. Filed in Supreme Court Aug. 22, 1921, Philadelphia.

175 Know all men by these presents, that we, Tony Vigliotti, as principal, and The Globe Indemnity Company of New York as surety, are held and firmly bound unto the Commonwealth of Pennsylvania, in the full and just sum of Three Thousand ($3000.00) Dollars, to be paid to the said Commonwealth of Pennsylvania, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of July, in the year of our Lord one thousand nine hundred and twenty-one.

Whereas, lately the Supreme Court of Pennsylvania, in a suit depending in said Court, between the Commonwealth of Pennsylvania versus Tony Vigliotti, Appellant, a judgment was rendered against the said Tony Vigliotti, and the said Tony Vigliotti having obtained writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Commonwealth of Pennsylvania citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now the condition of the above obligation is such, that if the said Tony Vigliotti shall prosecute said writ to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

In witness whereof, the said Tony Vigliotti has hereunto set his hand and seal, and the said The Globe Indemnity Company of New York has caused these presents to be signed in its name by its

local Vice-President, its corporate seal to be hereunto affixed,
176 and attested by its local Assistant Secretary, the day and year first above written.

(Signed) TONY VIGLIOTTI. [SEAL.]
THE GLOBE INDEMNITY COMPANY OF NEW YORK,
By HARRY D. STOUGHTON, [SEAL.]
Local Vice-President.

Attest:
F. M. BROWN,
Local Assistant Sec'y.

Approved by:
OLIVER WENDELL HOLMES,
Associate Justice of the Supreme Court of the United States,
if satisfactory to his Clerk.

Approved also by
ALEX. SIMPSON, JR.,
Justice Supreme Court of Penna.

Endorsement: Tony Vigliotti and The Globe Indemnity Company of New York, to Commonwealth of Penn'a. Bond. Sterling, Higbee & Matthews, Attorneys-at-Law; Uniontown and Connellsville, Pa. Filed in Supreme Court Aug. 22, 1921, Philadelphia.

177 In the Supreme Court of the United States.

No. —.

TONY VIGLIOTTI, Plaintiff in Error,

vs.

COMMONWEALTH OF PENNSYLVANIA, Defendant in Error.

Assignment of Errors.

Now comes Tony Vigliotti, Plaintiff in Error in this case, and in connection with his petition for a writ of error shows that in the record, proceedings and judgment of the Supreme Court of the State of Pennsylvania, aforesaid, error has intervened to his prejudice as follows:

1. The said court erred in holding that Section 15 of the Act of May 13, 1887, P. L. 113, of the laws of the State of Pennsylvania, commonly called the "Brooks Law" and entitled "An act to regulate and restrain the sale of vinous, spirituous, malt or brewed liquors or any admixtures thereof," being the law under which the petitioner in error was indicted and convicted, was not superseded

and repealed by the 18th Amendment to the Constitution of the United States, ratified January 20, 1919, and the Act of Congress adopted in pursuance thereof, commonly known as the Volstead Act and entitled the National Prohibition Act, passed on the 28th day of October, 1919.

2. The said court erred in holding that since the 18th Amendment to the Constitution of the United States and the Act of Congress known as the National Prohibition Law or Volstead Act and indictment, for selling liquor without license, lies under the statute of Pennsylvania known as the Brooks Law, Act of May 13, 1887, P. L. 108.

3. The said court erred in affirming the judgment of the Superior Court of Pennsylvania.

178 4. The said court erred in holding that the plaintiff in error had committed an offense indictable under the laws of Pennsylvania.

5. The said court erred in entering the following judgment:

"The judgments appealed from are affirmed, and it is directed that the orders of the Superior Court, contained in its affirmance of these judgments, be forthwith complied with."

By reason whereof, this petitioner and plaintiff in error prays that the said judgment of the Supreme Court of the State of Pennsylvania may be reversed.

Dated this 12th day of August, 1921.

FRANK DAVIS, JR.,
E. C. HIGBEE,
Attorneys for Tony Vigliotti.

Endorsement: Tony Vigliotti, Plaintiff in Error, vs. Commonwealth of Pennsylvania, Defendant in Error. Assignment of Errors. Filed in Supreme Court Aug. 22, 1921, Philadelphia.

179–180 UNITED STATES OF AMERICA, *ss:*

To the Commonwealth of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Pennsylvania wherein Tony Vigliotti is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Oliver Wendell Holmes, Associate Justice of the Supreme Court of the United States, this 16th day of August, in the year of our Lord one thousand nine hundred and twenty-one.

OLIVER WENDELL HOLMES,
Associate Justice of the Supreme Court of the United States.

On this 24th day of August, in the year of our Lord one thousand nine hundred and twenty-one, personally appeared Charles L. Lewellyn before me, the subscriber, a notary public in and for the county of Fayette and State of Pennsylvania, and makes oath that he delivered a true copy of the within citation to Wm. A. Miller, District Attorney for Fayette County, Pennsylvania, the authorized legal representative of the Commonwealth of Pennsylvania in the case refered to in the within citation.

CHARLES L. LEWELLYN.

Sworn to and subscribed the 24th day of August, A. D. 1921.

[Seal May Corristan, Notary Public, Uniontown, Penna.]

MAY CORRISTAN,
Notary Public.

My commission expires March 7, 1925.

August 24, 1921. Service of this citation accepted and copy of citation received.

WM. A. MILLER,
District Attorney for Fayette County, Pa.

[Endorsed:] Filed in Supreme Court Sep. 3, 1921, Philadelphia.

181 I, Robert von Moschzisker, Chief Justice of the Supreme Court of Pennsylvania, do hereby certify, that Rudolph M. Schick was, at the time of signing the annexed attestation, and now is, Prothonotary pro tem. of the said Supreme Court of Pennsylvania, in and for the Eastern District, to whose acts, as such, full faith and credit are and ought to be given: and that the said attestation is in due form.

In witness whereof, I have hereunto subscribed my name this 8th day of September one thousand nine hundred and twenty-one.

ROBT. VON MOSCHZISKER,
Chief Justice of the Supreme Court of Pennsylvania.

I, Rudolph M. Schick, Prothonotary pro tem. of the Supreme Court of Pennsylvania, in and for the Eastern District, do certify, that the Honorable Robert von Moschzisker by whom the foregoing Certificate was made and given, was, at the time of making and giving the same, and is now, Chief Justice of the Supreme Court of Pennsylvania; to whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court of Pennsylvania, in and for the Eastern District, at Philadelphia, this 8th day of September one thousand nine hundred and twenty-one.

[Seal of the Supreme Court of Pennsylvania, Eastern District.]

RUDOLPH M. SCHICK,
Prothonotary pro Tem.

182 In the Supreme Court of the United States, October Term, 1921.

No. 530.

TONY VIGLIOTTI, Plaintiff in Error,

vs.

COMMONWEALTH OF PENNSYLVANIA, Defendant in Error.

It is hereby stipulated by counsel for Tony Vigliotti, Plaintiff in Error, and counsel for the Commonwealth of Pennsylvania, Defendant in Error, that in printing the record in this case the following pages of the record as filed with the Clerk of the Supreme Court shall be omitted, namely:

Pages 3, 4, 5, 6, 7, 8, and 9 (being the transcript of the proceedings before the Justice of the Peace); pages 14 and 15 (being praecipes for subpœnas for witnesses); pages 17 and 18 (being certificate of attendance of witnesses and cost bill for serving subpœnas), all of the testimony of witnesses, objections and exceptions of counsel for the Commonwealth and the defendants, respectively, with reference to the admission or rejection of testimony, and statements and rulings of the Court with reference to the admission and rejection of testimony, beginning at the bottom of page 26 with the testimony of the witness, Marsh Hendrickson, and ending on page 102; pages 109 and 110 (being the petition of Rosi Vigliotti that her appeal to the Superior Court be made a supersedeas and the order of the Court allowing the same); pages 113 and 114 (being the bond given by Rosi Vigliotti on appeal); pages 115 and 116 (being the bond given by Tony Vigliotti on appeal to the Superior Court); page 117 (being certificate of Alfred O'Neal, Clerk of Courts of Fayette County, to the transcript); page 119 (being certiorari to the Court of Quarter Sessions in the case of Rosi Vigliotti); page 121 (being certiorari to the Superior Court in the case of Rosi Vigliotti); pages 154 to 168, inclusive, (being the papers filed in connection with the application of Tony Vigliotti to the Supreme Court
183 of Pennsylvania for a writ of error to the Supreme Court of the United States, namely, the petition to retain record, order thereon, memoranda of the Chief Justice of the Pennsylvania Supreme Court refusing the application for writ of error, petition for writ of error, assignment of errors, writ of error and bond); page

180 and 181 (being the certificate of the Prothonotary to the correctness of the original record).

It is further stipulated that the evidence of the Commonwealth, upon which the defendant was convicted, showed that in the spring of 1920, the defendant made sales for beverage purposes of a preparation called "Jamaica Ginger," containing eighty-eight per cent of alcohol; that the defendant had no lawful license to sell malt, spirituous, vinous or brewed liquors or admixtures thereof; neither was he a licensed druggist or apothecary.

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184 [Endorsed:] No. 530. October Term, 1921. Supreme Court United States. Vigliotti vs. Commonwealth of Pennsylvania. Stipulation.

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No. 530

IN THE

Supreme Court of the United States

October Term, 1921

TONY VIGLIOTTI,
Plaintiff in Error,

v.

THE COMMONWEALTH OF PENNSYLVANIA,
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF FOR PLAINTIFF IN ERROR.

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A. E. JONES,
FRANK DAVIS, JR.,
Attorneys for Plaintiff in Error.

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APPENDIX

CASES CITED

STATUTES CITED

MISCELLANEOUS

IN THE

Supreme Court of the United States

October Term, 1921

TONY VIGLIOTTI,
Plaintiff in Error,
v.
THE COMMONWEALTH OF PENNSYLVANIA,
Defendant in Error.

No. 530

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT

Plaintiff in error was indicted jointly with Rosi Vigliotti in Fayette County, Pennsylvania, for having sold on June 7, 1919, "vinous, spirituous, malt and brewed liquors and admixtures thereof, without having first obtained a license agreeably to law for that purpose." (Indictment R. 2) (The indictment also charged sales on Sunday, but the

verdict was "not guilty" as to this count.) Under this indictment both defendants were convicted in the Court of Quarter Sessions of Fayette County, Pennsylvania, "of selling spirituous liquor without a license." (Verdict, R. 4) The liquor sold was a preparation containing eighty-eight per cent of alcohol. (Stipulation, R. 45)

The defendants, prior to trial, moved to quash the indictment, which motion was overruled. (R. 3)

After the verdict the defendants filed a motion in arrest of judgment on the ground that the Pennsylvania statute, commonly called the "Brooks Law," under which the indictment was drawn, was superseded and repealed by the 18th Amendment to the Constitution of the United States and the National Prohibition Act (R. 5). Defendants also, at the same time, filed a motion for a new trial (R. 6) based upon the introduction of liquors, as evidence, which had been unlawfully obtained from premises owned by defendants. Both the motions in arrest and for a new trial were overruled and exceptions taken. (R. 5, 9). During the course of the trial defendants by appropriate requests for instructions to the jury raised the same questions, which were ruled upon adversely by the trial court and exceptions duly taken.

The defendant, Tony Vigliotti, was fined $1000 and sentenced to six months in the Allegheny County workhouse. A separate appeal was taken by him to the Superior Court (R. 13, 14) where

the judgment was affirmed (Opinion, R. 20-29). An appeal was granted by the Supreme Court of Pennsylvania "on the single question as to the effect of the 18th Amendment to the Constitution of the United States" (R. 29—"Endorsement"). The judgment of the lower court upon this question was affirmed (Opinion, R. 33-37).

The question for review here is whether since the 18th Amendment to the Constitution of the United States became effective a prosecution can be had under the previously enacted statute of Pennsylvania.

That Amendment is:

> "Section 1: After one year from the ratification of this article, the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States, and all territory subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited.
>
> Section 2: The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

It was proposed December 19, 1917, (40 Statute at Large 1050), ratified January 16, 1919, and became effective January 16, 1920.

The indictment is drawn under Section 15 of the Act of May 13, 1887, P. L. 108, (2 Purdon 2323-42, 13 Ed.) which reads:

> "Any person who shall hereafter be convicted of selling or offering for sale any vin-

ous, spirituous, malt or brewed liquors, or any admixture thereof, without a license, shall be sentenced to pay a fine of not less than five hundred ($500.00) dollars, nor more than five thousand ($5000.00) dollars, and undergo an imprisonment in the county jail of not less than three months nor more than tewlve months."

The Act is entitled:

> "An act to regulate and restrain the sale of vinous and spirituous, malt or brewed liquors, or any admixture thereof."

It was popularly known as the Brooks Law and will be hereafter so called. A complete copy of the statute is printed in Appendix "A" to this brief. It was often called "The Brooks High License Law." *Virginia Dare Wine,* 29 Pa. D. R. 116.

After this case was tried, by act approved May 5, 1921, the Brooks Law was amended. This amendatory act is known as the Wolner Act and a copy is printed in Appendix "B."

The Supreme Court of the State affirmed the conviction of plaintiff in error although conceding that:

> "Since the 18th Amendment under no statute may it, (the state), permit the sale, use or possession of liquors of a kind or in a manner prohibited by the Federal Law."

This conclusion was reached by the consider-

tion that the statute included not only liquors containing one-half of one per cent and more of alcohol, but also those containing a less quantity of alcohol, although it was clearly shown by the record that the liquor which plaintiff in error was charged with selling contained 88 per cent of alcohol.

SPECIFICATION OF ERRORS RELIED UPON

1. The Supreme Court of Pennsylvania erred in holding that Section 15 of the Act of May 13, 1887, P. L. 113, of the laws of the State of Pennsylvania, commonly called the "Brooks Law," being the law under which plaintiff in error was indicted and convicted, was not superseded and made void by the 18th Amendment to the Constitution of the United States; and the Act of Congress adopted in pursuance thereof, entitled the National Prohibition Act, passed October 28, 1919 (41 Stat. 305)

2. The said court erred in holding that since the 18th Amendment to the Constitution of the United States and the passage of the National Prohibition Act, an indictment for selling liquor without a license lies under the Pennsylvania statute known as the "Brooks Law," Act of May 13, 1887, P. L. 108.

3. The said court erred in entering judgment affirming the conviction of plaintiff in error by the lower court of Pennsylvania, and holding that plaintiff in error had committed an offense indictable under the laws of the State of Pennsylvania.

BRIEF OF ARGUMENT.

I. THE LICENSE SYSTEM OF PENNSYLVANIA CONFLICTS WITH THE PROHIBITORY SYSTEM ESTABLISHED BY THE EIGHTEENTH AMENDMENT.

1. Nature and purpose of the Brooks Law.

   (a) The Brooks Law is a regulation of the sale of intoxicating liquors.

   (b) So much of the Brooks Law as relates to liquors not intoxicating in fact, is only incidental to its primary object, the regulation of the sale of intoxicating liquors.

   (c) Construed otherwise than as a regulation of the sale of intoxicating liquors, the Brooks Law violates the 14th Amendment.

2. The Brooks Law conflicts with the 18th Amendment and if certain parts of it do not, such parts are not separable.

   (a) No part of the act remains in effect.

   (b) The licensing features no matter how considered, result in a conflict with the amendment.

3. The penal section of the Brooks Law is not independent and such parts of the statute as are said to remain in effect, exceed the limit to which the state may go in regulating liquors not in fact intoxicating.

4. Conclusions.

II. THE EIGHTEENTH AMENDMENT.

1. Section 1 is an absolute prohibition.

2. The right of the states is to enforce the Amendment as defined and sanctioned by congress by appropriate legislation.

3. The states under their concurrent power may not interfere with such liquors as the act of congress does not define as intoxicating.

4. Conclusions.

ARGUMENT.

I.

THE LICENSE SYSTEM OF PENNSYLVANIA CONFLICTS WITH THE PROHIBITORY SYSTEM ESTABLISHED BY THE 18TH AMENDMENT.

1.

Nature and Purpose of the Brooks Law.

The Supreme Court of the state said in this case:

> "The sale of such liquors, (intoxicating liquors) was permitted under the Brooks Law, because, and simply because, not forbidden; although there can be no doubt it was intended to be permitted to the limited extent there tacitly allowed."

It is therefore conceded that under the Brooks Law, intoxicating liquors might be sold by the persons obtaining licenses in conformity to its provisions, and it was the intent of the law that such licenses should be granted.

Under a former statute in *Schlaudecker v. Marshall,* 72 Pa. 200, it was said: (206)

> "The law of the land has determined that licenses shall exist."

and in *Raudenbusch's Petition,* 120 Pa. 328, it was said:

> "The law of the land has decided that licenses shall be granted to some extent."

This was the first case arising under this statute in the Supreme Court.

In speaking of this, the Superior Court said in 1914, *Venango County Liquor License,* 58 Pa. Supr. 277:

> "Particular stress is laid upon the declaration in the opinion of Schlaudecker v. Marshall: 'The law of the land has determined that licenses shall exist.' When this expression is read with the context, it is evident, we think, that what the court meant is that the policy of the Commonwealth as embodied in and exhibited by its laws, is that the sale of intoxicating liquors as a beverage shall be regulated by license, not prohibited, and that the court is to exercise its discretion in obedience to the settled policy of the Commonwealth as thus expressed, and not according to his individual opinion upon the propriety or impropriety of granting licenses."

The Brooks Law, as expressed in the title, regulates and restrains the sale of, and its provisions require a license to sell, "vinous and spirituous, malt or brewed liquors, or any admixture thereof," while the Amendment prohibits, inter alia, the sale of "intoxicating liquors for beverage purposes."

It is true that the language of the statute is broad enough to include liquors not in fact intoxicating, and it has been held by the Supreme Court of the State that the percentage of alcoholic content is immaterial in determining whether a particular liquor is within its terms. *(Commonwealth v. Reyburg,* 122 Pa. 299-304).

It is also true that the descriptive words of the statute include all, or nearly all, known intoxicating liquors.

While there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement, (National Prohibition Cases, 253 U. S. 350-387), the question whether this statute transcended the limits of the state power by including liquors not in fact intoxicating, does not appear ever to have been raised.

The opinion of the Supreme Court of Pennsylvania seems to be based on the proposition that the Brooks Law is in force in part at least, notwithstanding the 18th Amendment, because they do not deal with the same subject matter, the amendment prohibiting "intoxicating liquors for beverage purposes," while the state statute operates upon "vinous and spirituous, malt or brewed liquors, or any admixtures thereof."

This raises several questions, which it is deemed important to present in some detail.

(a)

The Brooks Law is a Regulation of the Sale of Intoxicating Liquors.

The Brooks Law shows on its face that the legislative thought was intoxicating liquors.

Section 4 makes it the duty of mercantile appraisers to return under oath all licensed and unlicensed hotels, taverns, inns, restaurants or saloons engaged in selling "intoxicating liquors."

Section 16 provides:

> "That druggists and appothecaries shall not be required to obtain licenses under the provisions of this act, but they shall not sell intoxicating liquors except upon the written prescription of a regularly registered physician",

That the Legislature used the expression, "intoxicating liquors" as the substantial equivalent of "vinous and spirituous, malt or brewed liquors", appears from the first proviso to that section

> "That no spirituous, vinous, malt or brewed liquors shall be sold or furnished to any person more than once on any one prescription of a physician,"

and the second proviso,

> "That any person who shall willfully prescribe any intoxicating liquors as a beverage

to persons of known intemperate habits, shall be guilty of a misdemeanor."

When this statute was enacted by the Legislature, both the terms "vinous and spirituous, malt or brewed liquors, or any admixture thereof," and "intoxicating liquors," were familiar expressions in the legislation of Pennsylvania, and an examination of the statutes both before and after the Brooks Law shows that they were used interchangeably and as equivalents, although the precise expression in certain enactments manifests an intention and purpose, in order to make the restraints and regulations imposed upon intoxicating liquors effective, to include within the legislation certain liquors in fact not intoxicating, so as to avoid issuable facts in that connection.

This is shown by extracts from a number of these statutes printed in Appendix "C."

Since the expression intoxicating liquors is employed in this statute, no particular significance attaches to the fact that its first appearance is in Section 4.

The words "liquors," "spirituous liquors," "vinous liquors" and "brewed liquors," naturally suggest intoxicating liquors. They have long been used not only in Pennsylvania, but in all the states in connection with legislation intended to reduce the evils resulting from the unrestrained sales of intoxicating liquors.

While these terms may properly include, on principles hereafter discussed, liquors not in fact

intoxicating, they primarily indicate in legislative use intoxicating liquors.

Chapter 47 of the revised statutes of Massachusetts, the statute of Rhode Island, and the statute of New Hampshire, involved in *License Cases,* 5 Howard 504, did not mention intoxicating liquors. The only statute there involved using that phrase was the supplemental act of 1837 of Massachusetts. They were, however unanimously considered as operating upon and including, and intended to suppress the traffic in intoxicating liquors.

The cases dealing with the administration of the Brooks Law during the more than 33 years that it was on the statute books, demonstrate that it was fundamentally and primarily a law regulating and restraining the sale of intoxicating liquors.

Some of these cases are quoted, and others cited, in the Appendix "D," "E," "F" and "G."

(b)

So much of the Brooks Law as relates to liquors not intoxicating in fact is only incidental to its primary object, the regulation of the sale of intoxicating liquors.

Before the 18th Amendment, the state in the exercise of its police power might prohibit the manufacture and sale of intoxicating liquors.

Bartemeyer v. Iowa, 18 Wall. 129.
Boston Beer Co. v. Massachusetts, 97 U. S. 25.

Mugler v. Kansas, 123 U. S. 623.
Kidd v. Pearson, 128 U. S. 1.
Crowley v. Christeson, 137 U. S. 86.

The state might also regulate and restrain the sale of such liquors and might provide a system to license such sales.

License Cases, 5 How. 504.

The constitutionality of the Brooks Law was sustained on this specific ground. The question was first raised in *Boyle's License,* 8 Pa. Supr. 521, which was affirmed by the Supreme Court in *Boyle's License,* 190 Pa. 577. The question was again before the Superior Court in *Gregg's License,* 36 Pa. Supr. Ct. 633, the opinion in which, quoting the former, follows:

> "This is not a new question, but has been impliedly decided in numerous cases both in this court and the Supreme Court and was expressly decided where it was distinctly raised in *Boyle's License,* 8 Pa. Superior Ct. 521. We there said: 'The power of the state to regulate the sale of intoxicating liquors, and, in the exercise of that power, to authorize the granting of licenses to fit persons under such conditions as the legislature may impose, is too well settled to be open to discussion'. The correctness of this conclusion was affirmed by the unanimous opinion of the Supreme Court upon appeal, 190 Pa. 577, and nothing has occurred since, or is suggested in the argument

of appellant's counsel to create a doubt regarding it."

This is an exercise by the state of its power asserted by this Court in the cases just cited.

This is as authoritative a declaration as could well be that the Brooks Law is a law regulating intoxicating liquors. In other words, the act was valid legislation and constitutional because it was within the power of the state to license the sale of intoxicating liquors, and the act in question was the exercise by Pennsylvania of that power.

As an appropriate method of making effective the regulations and restraints which the state sought to impose upon the sale of intoxicating liquors, it was, on familiar principles, quite competent for it to include within its regulatory system, liquors not in fact intoxicating in order to avoid issuable facts as questions concerning its enforcement from time to time arose.

> "For the legislation and decisions of the highest courts of nearly all of the states establish that it is deemed impossible to effectively enforce either prohibitory laws or other laws merely regulating the manufacture and sale of intoxicating liquors, if liability or inclusion within the law is made to depend upon the issuable fact whether or not a particular liquor made or sold as a beverage is intoxicating. In other words, it clearly appears that a liquor law, to be capable of effective enforcement, must, in the opinion of the legislatures and courts of the several states, be made to ap-

ply either to all liquors of the species enumerated, like beer, ale or wine, regardless of the presence or degree of alcoholic content; or, if a more general description is used, such as distilled, rectified, spirituous, fermented, malt or brewed liquors, to all liquors within that general description, regardless of alcoholic content; or to such of these liquors as contain a named percentage of alcohol; and often several such standards are combined so that certain specific and generic liquors are altogether forbidden and such other liquors as contain a given percentage of alcohol." *Ruppert v. Caffey,* 251 U. S. 264 (282).

"It is also well established that, when a state exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government. *Booth v. Illinois,* 184 U. S. 425; *Otis v. Parker,* 187 U. S. 606; *Ah Sin v. Wittman,* 198 U. S. 500, 504; *New York ex rel. Silz v. Hesterberg,* 211 U. S. 31; *Murphy v. California,* 225 U. S. 623. With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended." *Purity Extract v. Lynch,* 225 U. S. 192 (201).

And again, at p. 204, it is stated:

> "It was competent for the legislature of Mississippi to recognize the difficulties besetting the administration of laws aimed at the prevention of traffic in intoxicants. It prohibited, among other things, the sale of 'malt liquors'. In thus dealing with a class of beverages which in general are regarded as intoxicating, it was not bound to resort to a discrimination with respect to ingredients and processes of manufacture which, in the endeavor to eliminate innocuous beverages from the condemnation, would facilitate subterfuges and frauds and fetter the enforcement of law. A contrary conclusion logically pressed would save the nominal power while preventing its effective exercise. The statute established its own category. The question in this court is whether the legislature had power to establish it. The existence of this power, as the authorities we have cited abundantly demonstrate, is not to be denied simply because some innocent articles or transactions may be found within the prescribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat."

The Legislature of Pennsylvania to restrain and regulate the sale of intoxicating liquors enacted a statute dealing with "vinous and spirituous, malt or brewed liquors, or any admixtures thereof", which includes certain liquors not in fact intoxicating; without here considering whether the statute transcended any legal limit by including liquors

not in fact intoxicating, and assuming it to be wholly valid in that respect, the authority of the state to enact it is found in the power of the state to regulate and restrain the sale of intoxicating liquors, and the statute is therefore one dealing with that subject, and so much of it as includes liquors not actually intoxicating is constitutional solely because such provisions are suitable and appropriate methods and means of enforcing the regulation and restraint intended to be imposed upon the sale of intoxicating liquors.

(c)

Construed otherwise than as a regulation of the sale of intoxicating liquors, the Brooks Law violates the 14th Amendment.

If the Brooks Law be considered apart from the fact that it includes intoxicating liquors it is clearly invalid. Because it does include intoxicating liquors, and is in reality a restraint and regulation of their sale, it is conceded that it was within the power of Pennsylvania to enact, the inclusion of liquors in fact not intoxicating being properly referable to the power of the State to regulate and restrain the sale of intoxicating liquors.

The Supreme Court of the State said in this case:

"It is Pennsylvania's police power method of officially listing and adequately controlling the customary sources of direct supply and distribution to the people within her borders of those kinds of liquors among which intoxicating liquors are usually found."

If this and the other portions of the opinion are intended to mean that the legislature of Pennsylvania undertook to "regulate and restrain the sale of vinous and spirituous, malt or brewed liquors, or any admixture thereof" apart and aside from the fact that intoxicating liquors were included in this class, the enactment is clearly invalid. The right of a citizen to engage in any lawful business is fundamental.

"The liberty mentioned in that amendment (fourteenth) means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." *Allgeyer v. Louisiana,* 165 U. S. 578 (589).

Mr. Justice Peckham then quotes from Mr. Justice Bradley in *Butcher's Union Company v. Crescent City Company,* 111 U. S. 746-62:

> "The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen.' Again, on page 764, the learned justice said: 'I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States.' And again, on page 765: 'But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen.' It is true that these remarks were made in regard to questions of monopoly, but they well describe the rights which are covered by the word 'liberty' as contained in the Fourteenth Amendment."

Again, in *Powell v. Pennsylvania,* 127 U. S. 678, 684, Mr. Justice Harlan, in stating the opinion of the court, said:

> "The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, is an essential part of his rights of liberty and property, as guaranteed by the Fourteenth Amendment. The court assents to this general proposition as embodying a sound principle of constitutional law."

To the same effect is what was said by Mr. Justice Field in *Dent v. West Va.,* 129 U. S. 114:

> "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may, in many respects, be considered as a distinguishing feature of our republican institutions. Here, all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study, and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be taken from them

any more than their real or personal property can be thus taken."

It is not necessary to indulge protracted discussion on this point. The validity of the legislation here in question as originally enacted is admitted. It is asserted with confidence that it is so valid because it was in fact and substance a regulation of the sale of intoxicating liquors, and the present purpose is only to show that if considered otherwise it is invalid.

It is to be noticed that the act is not a prohibition of the sale of the liquors to which it relates. It provides for licenses to be issued for such sale, and that sales may be made by the persons holding such licenses. It denies, however, the right to most persons to obtain such licenses. The Courts of Quarter Sessions are vested with a broad discretion to determine who are fitted to have such licenses, and whether the licenses applied for are necessary for the accommodation of the public. Only so many are to be granted as the courts determine requisite for this purpose.

The professed purpose of the statute is to restrain sales. Such an act could not be predicated of and made to operate on any subject not in and of itself harmful and deleterious to the public welfare.

If enacted of food, clothing or any common article of commerce, this statute would be clearly void. When stript of its connection and association with intoxicating liquors, it assumes the char-

acter of a restraint and regulation of the sale of harmless commodities.

If in order to deprive it of its character as the regulation and restraint of the sale of a harmless commodity, its connection and association with intoxicating liquors be taken into consideration, it becomes in truth and reality a law regulating and restraining the sale of intoxicating liquors and so much of it as does not include liquors actually intoxicating in fact is only incidental to its purpose and takes character from its primary object.

The statute cannot be considered as a systematic regulation of something other than "intoxicating liquors for beverage purposes," so as to avoid conflict with the 18th Amendment and then regarded or construed as relating to such liquors to avoid conflict with the 14th Amendment.

2.

The Brooks Law Conflicts with the 18th Amendment, And if Certain Parts of It Do Not, Such Parts Are Not Separable.

These considerations bring the statute directly within the ruling of this Court in *State of Rhode Island v. Palmer,* (National Prohibition Cases), 253 U. S. 350 (386).

> "6. The first section of the Amendment—the one embodying the prohibition—is operative throughout the entire territorial limits

of the United States, binds all legislative bodies, courts, public officers, and individuals within these limits, and of its own force invalidates every legislative act, whether by Congress, by a state legislature, or by a territorial assembly—which authorizes or sanctions what the section prohibits."

The Brooks Law authorizes or sanctions what the first section of the amendment prohibits. Admittedly intoxicating liquors for beverage purposes were sold under it for more than thirty years. The places at which such liquors were sold in popular speech were saloons and barrooms, and were frequently referred to by the courts in the administration of the act in these terms. In common speech throughout the state the term license itself was practically synonymous with the right to sell intoxicating liquors. During the 33 years that the act was in force, it was never thought of nor considered except as primarily regulating the sale of intoxicating liquors, and during every year in which it was in operation, large quantities of such liquors were sold for beverage purposes under its provisions.

The opinion of the Supreme Court concedes that the sale of such liquors was permitted because not forbidden, and that there can be no doubt it was intended that the sale of such liquors should be permitted to a limited extent. There is then a direct conflict between the amendment and the statute in question.

The Supreme Court conceded that since the 18th

Amendment, under no statute may the state permit the sale, use or possession of liquors of a kind or in a manner prohibited by the Federal Law. This concedes a conflict between the amendment and the statute, but does not obviate the consequences thereof. This raises two questions:

(a) There being a direct conflict between the amendment and so much of the statute as includes intoxicating liquors for beverage purposes, is any part of the statute left in effect?

(b) And the Courts of Quarter Sessions having no authority under the law of the state to grant a limited license, licenses issued under the statute are bound to include intoxicating liquors for beverage purposes.

(a)

No Part of the Act Remains in Effect.

It having been admitted that the Brooks Law includes intoxicating liquors for beverage purposes, and it having been shown that it was enacted in virtue of the right of the state to regulate and restrain the sale of such liquors, and that the state fundamentally was without right to regulate and restrain the sale of non-intoxicating liquors in the terms of that statute except as incidental to the main object of regulating the sales of intoxicating liquors, the conclusion follows that, the main

part of the act having been superseded or become wholly inoperative, no part of it can remain in effect.

Cessante ratione legis cessat ipsa lex.

If this statute had been enacted since the Amendment, it would be unconstitutional. Because of the inseparable character of its provisions it would be unconstitutional as a whole.

> *Employer's Liability Cases,* 204 U. S. 463.
> *Warren v. Mayor and Alderman of Charlestown,* 2 Gray 84.

The same principle was applied by this Court in determining the validity of a state statute.

In *Connelly v. Union Sewer Pipe Company,* 184 U. S. 540, it was said by Mr. Justice Harlan (564):

> "We therefore hold that the act of 1893 is repugnant to the Constitution of the United States, unless its ninth section can be eliminated, leaving the rest of the act in operation.
>
> The principles applicable to such a question are well settled by the adjudications of this court. If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative. The first section of the act here in question embraces by its terms all persons,

firms, corporations or associations of persons who combine their capital, skill or acts for any of the purposes specified, while the ninth section declares that the statute shall not apply to agriculturists or live stockdealers in respect of their products or stock in hand. If the latter section be eliminated as unconstitutional, then the act, if it stands, will apply to agriculturists and live stock dealers. Those classes would in that way be reached and fined, when, evidently, the legislature intended that they should not be regarded as offending against the law even if they did combine their capital, skill or acts in respect of their products or stock in hand. Looking then at all the sections together, we must hold that the legislature would not have entered upon or continued the policy indicated by the statute unless agriculturists and live stock dealers were excluded from its operation and thereby protected from prosecution. The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the ninth section."

In legal principle no fundamental difference results from the fact that the present constitutional amendment was subsequent in point of time to the statute.

It is conceded that a very material and substantial part of the legislative enactment is swept away. At most nothing but a shell remains. As

originally enacted the statute is a complete system. Each part is dependent upon another. All its sections and provisions are a well-formulated method and scheme, not to prohibit the sale of intoxicating liquors for beverage purposes, but to regulate and restrain the sale thereof, including in the scheme certain liquors not intoxicating in order that the primary object thereof may be successfully accomplished.

Viewed in the light most favorable to the decision of the Supreme Court of Pennsylvania, it was intended to operate upon intoxicating liquors as well as non-intoxicating liquors, but in its terms they are inseparable.

If the statute had not included intoxicating liquors, there is no reason whatever to assume that the legislature would have enacted it.

In its emasculated form, it in no sense expresses the will of the legislature of Pennsylvania, and if part of it remains in force, there is in Pennsylvania a statutory law not made by the legislature of the State, but brought about by the operation of a Federal enactment on a state statute.

If the provisions were separable and independent this might well be. But if the intention of the legislature constitutes the law, no part of this statute can remain in effect.

The Supreme Court of Pennsylvania, speaking by the Chief Justice, said:

"If the Brooks Law had been written for the express or prime purpose of deriving revenue from, licensing the sale, and regulating and encouraging the use of, intoxicating liquors, as appellants seem to think, and all the numerous features therein of a strictly prohibitory nature, of which there are many, were subordinate to what they take to be its real purpose, then it might well be said there was such incompatibility between it and the 18th Amendment that the two could not stand together."

While counsel disclaim any intention to have argued in that court that the purpose of the law was to derive revenue (albeit it did raise revenue), and encourage the use of intoxicating liquors, the point is now immaterial. Their argument there was that the statute was not a prohibition law, admitting that its purpose was to decrease the places at which such liquors were sold and that it had done so.

Since the act was not a prohibition law, "all the numerous features therein of a prohibitory nature, of which there are many," are immaterial and may be laid aside.

If the proposition of the learned Chief Justice be restated so as to read:

"If the Brooks Law had been written for the express or prime purpose of licensing the sale and regulating and restraining the use of intoxicating liquors,"

it would embrace the exact provisions of the Brooks Law as it was administered for 33 years and would differ in detail, but not in substance, from the proposition which the Chief Justice announced and from which he concluded, "It might well be said there was such incompatibility between it and the 18th Amendment that the two could not stand together."

Neither this statute nor any other of Pennsylvania makes the substantive act of selling liquor a crime. This act nowhere undertakes to prohibit the sale of liquor.

In strict keeping with the purpose of the act, which was not to prohibit the traffic in intoxicating liquors, but merely to regulate and restrain it, the penalty is provided for "selling liquor without a license," and not for selling liquor.

It does not follow that because the legislature saw fit to make it a penal offense to sell liquor without a license and to punish it by a minimum fine and imprisonment, that it was willing to make and did make the offense of selling liquor a misdemeanor, and to visit like penalties upon the offender.

Section 15 of the Brooks Law prescribes minimum penalties of both fine and imprisonment for selling liquor without a license. Under the Volstead Act, for a first offense there is no minimum sentence. It may be either fine or imprisonment. For a second offense the penalty under the Volstead Act is less severe than the minimum sen-

tence prescribed by the Brooks Law for a first offense.

These penalties the legislature was quite willing to impose under conditions where it sought only to regulate the sale of liquor, leaving it free to be supplied to the public to the extent necessary, but it by no means follows that the legislature of 1887, or any other legislature of Pennsylvania, was willing to provide like minimum penalties for the offense of selling liquor as a means of enforcing the 18th Amendment. Be this as it may, it is nevertheless plain that the penalties provided by the legislature to be visited upon persons convicted of selling liquor without a license, have never been legislatively ordained to be inflicted upon persons for violating the 18th Amendment to the Constitution of the United States.

The 18th Amendment and Act of Congress prohibit not only the sale, but the manufacture, importation, exportation and transportation of intoxicating liquors for beverage purposes. The purpose of this legislation is to annihilate and destroy the traffic in intoxicating liquors and thereby eliminate the evils that flow from it.

The purpose of the Brooks Law was not to destroy this traffic. It undertook to minimize the evils attendant upon the unregulated sale of intoxicating liquors by establishing a system where such sales could be made only by persons and at places licensed for that purpose by the Courts of Quarter Sessions, to the extent that was necessary for the accomodation of the public.

The two systems are diametrically opposite. They are in conflict in every respect. They cannot stand together.

In *United States v. Boze Yuginovich,* decided June 1, 1921, this Court held that the 18th amendment and Volstead Act repealed certain sections of the revised statutes making it a criminal offense to defraud or attempt to defraud the United States of a tax upon spirits distilled by one carrying on the business of a distillery, or to keep the sign "Registered Distillery" on the outside of a place of business used as a distillery, or to carry on the business of a distillery without a bond.

In that case this Court, by Mr. Justice Day, said:

> "These statutes have long been part of the Federal internal revenue legislation and were passed under the authority of the taxing power conferred upon Congress by the Constitution of the United States. At the time of their enactment it was legal, so far as the Federal government was concerned, to manufacture and sell ardent spirits for beverage purposes. The government derived large revenues from taxing the business, which it sought to realize and protect by the system of laws of which the sections in question were a part. This policy was radically changed by the adoption of the 18th Amendment to the Federal Constitution, and the enactment of legislation to make the Amendment effective. The 18th Amendment in comprehensive, and clear language prohibits the manufacture or sale

of intoxicating liquors in the United States for beverage purposes, and confers upon Congress the power to enforce the Amendment by appropriate legislation. To this end, Congress passed a national prohibition law known as the Volstead Act. 41 Stat. at L. 305, chap. 83. It is a comprehensive statute intended to prevent the manufacture and sale of intoxicating liquors for beverage purposes. * * *

"Having in mind these principles, and considering now the first count of the indictment, charging an attempt to defraud and actually defrauding the government of the revenue tax, we do not believe that the general language used at the close of Section 35 evidences the intention of Congress to inflict for such an offense the punishment provided in Section 3257, with the resulting forfeiture, fine, and imprisonment, and at the same time to authorize prosecution and punishment under Section 35, enacting lesser and special penalties for failing to pay such taxes by imposing a tax in double the amount provided by law, with an additional penalty of $500 on retailers and $1,000.00 on manufacturers. Moreover, the concluding words of the first paragraph of Section 35, as to all the offenses charged, must be read in the light of established legal principles governing the interpretation of statutes, and in view of the provisions of the Volstead Act itself, making it unlawful to possess intoxicating liquors for beverage purposes, or property designed for the manufacture of such liquor, and providing for its distruction. We agree with the court below that while Congress manifested an intention to tax

liquors illegally as well as those legally produced, which was within its constitutional power, it did not intend to preserve the old penalties prescribed in Section 3257 in addition to the specific provision for punishment made in the Volstead Act.

"We have less difficulty with the other sections of the prior revenue legislation under which the charges, already set forth, are made. We think it was not intended to keep on foot the requirement as to displaying the words 'Registered Distillery' in a place intended for the production of liquor for beverage purposes which could no longer be lawfully conducted; nor to require a bond for the control of such production; nor to penalize the making of mash in a distillery which could not be authorized by law."

The Supreme Court of Ohio, in *State, ex rel. Rose v. Donahey,* 125 N. E. 908, in considering the effect on the license laws of the state of a prohibitory amendment, said:

"Having in mind the policy of the state as expressed by its adoption of present section 9, art. 15, of the Constitution and the repugnancy of the licensing system to that policy, we feel that a reasonable interpretation of that statute and the schedule thereto repeals the statutes creating the state liquor licensing board, that the incidental duty conferred upon it of assisting County Auditors in listing for taxation property liable under the Dow-Aiken Law, assuming that law not to have been repealed, does not operate to make its continued

existence consistent with constitutional prohibition, and we therefore hold the board ceased to exist upon the taking effect of said Constitution."

In considering a similar statute, the Supreme Court of Georgia, in *Draper v. State,* 6 Ga. App. 12, 64 S. E. 177, said:

"The defendant could not have been convicted of either of the sales alleged to have been made in 1908, because as held in *Glover v. State,* 4 Ga. App. 455, 61 S. E. 862, the passage of the general prohibition law, which by its terms became effective January 1, 1908, repealed all existing statutes regulating the sale of intoxicating liquors in this state. * * *

"If the only sales shown by the testimony in this case had occurred subsequent to January 1, 1908, the defendant could not legally have been convicted."

In *State v. Tonks,* 15 R. I. 385, 5 Atl. 636, the Supreme Court of Rhode Island said:

"This is a complaint for violation of Pub. St. R. I. c. 87, sec. 25, which prohibits the offering to sell, selling or suffering to be sold, certain intoxicating liquors therein named, in violation of the preceding section of the chapter. * * *

"It is contended that the chapter and section are in conflict with the Fifth Amendment to the Constitution, because the chapter enacts a license system and section 25 is a dependent part of it. We think the point is well taken.

Section 25 is not a separate and independent provision but a provision for the punishment of the violation of the preceding sections by which a license system is created. It is subsidiary to the system, and, inasmuch as the system cannot exist consistently with the Fifth Amendment, any provision which is subsidiary to it must fall with it, since the licensing and prohibitory parts of the system are so interwoven that they cannot be separated. The same is true of complaints brought under Section 26. Complaints under either of these sections must therefore be quashed."

(b)

The Licensing Features, No Matter How Considered, Result in a Conflict with the Amendment.

The opinion of the Supreme Court indicates that the Brooks Law remains in force to the extent that it is not in conflict with the 18th Amendment and the Act of Congress for its enforcement.

It is silent as to the effect of the Amendment and Act of Congress on the licensing features of the Brooks Law. It is fairly plain that the Supreme Court intended to hold that the Brooks Law remains in force as to all liquors within its terms and not falling within the definition of the Act of Congress.

Either the Courts of Quarter Sessions of Pennsylvania have the right to grant licenses for the sale of such liquors or they have not.

Under the law of the state the courts of Quarter Sessions cannot grant licenses having limited effect and operation so as far as concerns the liquors that may be sold thereunder.

In *Commonwealth v. Spence,* 230 Pa. 571, it was held that the authority of the court was limited to granting or refusing licenses, and that the court could not grant them otherwise than for the sale of "vinous and spirituous, malt or brewed liquors, or any admixture thereof," and that if the court undertook to limit such licenses by restricting them to the sale of vinous and malt liquors, that a person who held such a license could not be convicted of the offense of selling liquor without a license, although the liquor which he sold was spirituous. The opinion in this case appears in Appendix G.

There are here three, and only three, possible alternatives, any of which is fatal to the validity of this statute:

(1) The Courts of Quarter Sessions may grant licenses in form as they have heretofore done, so that under the law of the state the holders thereof may not be convicted of selling such liquors as the Amendment prohibits, in which event there will be a class of persons authorized to do what the Amendment prohibits.

(2) The Courts of Quarter Sessions may not grant any licenses at all, in which event the statute has become an absolute prohibition of the sale of liquors not prohibited by the

Amendment, in which event it is a law that the legislature did not make and one which it would have no right to make.

(3) The Courts of Quarter Sessions may grant licenses for the sale of such liquors as are not prohibited by the Amendment, in which event the offense of selling liquors without license must consist of the sale of liquors for which such licenses may be granted, that is, liquors the sale of which the Amendment does not prohibit.

(1)

If it be assumed that the Courts of Quarter Sessions may still grant licenses, then the holders of such licenses cannot be convicted of selling liquor without a license without regard to whether the liquor be intoxicating or not. In other words, if such licenses be granted by a court of Quarter Sessions, the holders of such licenses may do what the 18th Amendment prohibits, without liability to prosecution in the state courts.

This was conceded by counsel for the Commonwealth in the argument of this case in the Superior Court. They there said in their brief:

> "The Brooks Law authorizes or sanctions what the Amendment prohibits to the extent that a holder of a license may sell intoxicating liquors without committing a criminal act punishable by the state."

On the assumption that the courts have the power to grant licenses, (and since the Amendment many such licenses have been granted), there will be a class of persons in Pennsylvania who cannot be prosecuted under the state law for doing what the 18th Amendment prohibits.

Section 13 of the amendatory act of May 5, 1921, recognizes the validity of all licenses granted under the Brooks Law. There seems to be no question that in the legislative view at least such licenses could be granted, and it necessarily follows that the holders thereof could not be prosecuted in the State court for selling "vinous and spirituous, malt or brewed liquors, or any admixture thereof" without regard to the degree of alcoholic content. This results in direct conflict between the Amendment and the statute.

(2)

If it be assumed that the Courts of Quarter Sessions of the state may not grant any licenses, the Brooks Law becomes by force and virtue of the 18th Amendment, a prohibition not only of the sale of intoxicating liquors for beverage purposes, but of the sale of all vinous and spirituous, malt and brewed liquors or admixtures thereof, not falling within the terms of the Amendment as defined by Congress, a result that the legislature of Pennsylvania never intended. Such a law absolutely prohibiting the sale of liquors not intoxicating, and

not included in the Act of Congress for the enforcement of the Amendment, and not enacted by the state for the purpose of enforcing the Amendment, is so unwarranted, arbitrary, and confiscatory as to conflict with the 14th Amendment.

The Brooks Law did not permit sales in excess of one quart, and the Act of June 9, 1891, P. L. 257, entitled, "An Act to restrain and regulate the sale of vinous and spirituous, malt or brewed liquors, or any admixture thereof, by wholesale," established the same license system relating to sales in quantities greater than one quart as that provided by the Brooks Law, except that, to obtain a license for a brewery or distillery, it was not required that it be necessary for the accomodation of the public.

The 18th Amendment prohibits the sale of intoxicating liquors for beverage purposes, and the Act of Congress recognizes that the sale of intoxicating liquors may be lawfully made for other purposes by prescribing the conditions upon which such sales may be made.

Section 16 of the Brooks Law authorized the sale of alcohol and preparations containing alcohol for scientific, mechanical or medicinal purposes, which is the only exception to its requirement for a license.

What may be rightfully done under the Act of Congress is an offense under the Brooks Law. The sale of liquor to a druggist in Pennsylvania, the sale of wine for sacramental purposes, although done in strict conformity with the Acts of Con-

gress, would be a crime in Pennsylvania if the Courts of Quarter Sessions may not grant any licenses at all, if an indictment for selling liquor without a license will lie.

This may obviate conflict between the Amendment and the statute, but it renders the statute wholly void.

(3)

If the Courts of Quarter Sessions may grant licenses for the sale of that class of liquors not prohibited by the Amendment, an Amendment to the Constitution of the United States and an Act of Congress not purporting to do so, have operated to limit the powers and jurisdiction of the Courts of Quarter Sessions of Pennsylvania which derive their authority solely from the constitution and laws of that state. Granting that Congress might confer certain jurisdiction upon them, it has not done so.

If it be asserted that the licensing of the sale of such liquors is an appropriate method of enforcing the Amendment, the answer that such legislation has not been enacted by Pennsylvania for that purpose is conclusive.

If the act remains in force so that the Courts of Quarter Sessions may grant licenses for the sale of liquors not prohibited by the Amendment, the limitations and restrictions placed by it upon the right to secure such license is an unwarranted in-

terference with individual and property rights and unlawful, as fully discussed in l. c. of this brief, beginning on page 18.

However, the penal section is limited to the terms of the act. The act is inoperative so far as the subject of liquors prohibited by the Amendment is concerned. The penal section, not relating to or denouncing the act of selling liquors, but being confined to the sale of liquors without a license, the class of liquors for selling which a person may be indicted, is the class for which a license to sell may be granted.

Since the line of demarkation is drawn by the percentage of alcoholic content, proportion is the essence of the thing, in identifying the liquors to which the license features of the act relate.

The record in this case shows that the liquors which the plaintiff in error was convicted of selling contained 88 per centum of alcohol. This fact took the case out of the operation of the statute.

The burden was on the Commonwealth to show that the liquors which were sold were of the class or kind which the state could grant a license to sell. The bill of indictment failed to so show. The undisputed and admitted fact is that the liquors were not in that class.

This leaves the offense charged against the plaintiff in error, and of which he was convicted, outside the valid part of the statute.

This is the system or scheme established by the amendatory act. It requires a license to sell liquors not prohibited by the amendment. It

makes it an indictable offense to sell such liquors without a license, and also makes it an indictable offense to sell what it terms intoxicating liquors, that is, liquors prohibited by the amendment. The two offenses are wholly distinct. To constitute the former—that is, selling liquor without a license—it must be made to appear that the liquors which it is an offense to sell without a license are liquors for the sale of which a license may be granted.

3.

The Penal Section of the Brooks Law is Not Independent, and Such Parts of the Statute as Are Said to Remain in Effect Exceed the Limit to Which the State May Go in Regulating Liquors Not in Fact So, as Intoxicating.

Notwithstanding the words and expressions of the opinion of the Supreme Court of the State, and considering the substance of the opinion under examination, it does not divorce the Brooks Law from a regulation and restraint of the sale of intoxicating liquors for beverage purposes.

It is true that it is said that the Brooks Law is not a regulation of the sale of intoxicating liquors, but of a broader class among which intoxicating liquors are ordinarily found, yet in the judicial thought running throughout the opinion, they appear to be inseparable and the attempt to separate and distinguish them does not succeed. Although

the Supreme Court makes no reference to the power of the state in this behalf, yet it remains quite plain that aside from the legislative purpose to regulate and restrain the sale of intoxicating liquors, there is no substantial basis on which to sustain the act.

Admittedly there is a conflict between the 18th Amendment and the Act of Congress on the one hand and the Brooks Law on the other, and the decision of the Supreme Court is that except where they thus conflict the state statute remains in effect, including its penal section.

No definite outline of the portion of the Brooks Law remaining in effect is attempted. It certainly must be conceded that the penal section is dependent upon the other provisions of the act. The term "without a license" in this section is equivalent to "except as provided by this act," or some similar expression. This section is not a separable independent enactment, but is subsidiary to the system created by the statute and admirably adapted for its enforcement.

It certainly is anomalous that after the fundamental law of the land has prohibited not only the sale but the manufacture, importation, exportation and transportation of intoxicating liquors for beverage purposes, that a man may be indicted under the law of a state for selling such liquors without a license.

Not only, if this be true, may he be so indicted, but the indictment must be so drawn. Under the law of the state, he cannot in terms be indicted

for doing what the amendment prohibits. The following from the opinion of the Circuit Court of Appeals of the Eighth Circuit in *Ketchum v. United States*, 270 Fed. 416, 418, in reference to the effect of the 18th Amendment on certain parts of the revenue law of the United States is pertinent:

> "Coming, now, to the several counts in the indictment, it appears that the defendants were punished, not for having in their possession and custody a still and distilling apparatus for the production of spirituous liquors, but for not having said still registered as required by law; not for carrying on the business of a distiller of spirituous liquors, but carrying it on without having given a bond as required by law; not for carrying on the business of a distiller of spirituous liquors, but carrying it on with intent to defraud the United States of the tax on the spirits distilled by them; not for working in a distillery for the production of spirituous liquors, nor for carrying distilled spirits from such distillery, nor for carrying and delivering raw materials to such distillery, but the doing of these last three acts with reference to a distillery upon which no sign bearing the words 'Registered Distillery' was placed and kept as required by law; not for carrying on the business of a retail liquor dealer, but carrying it on without having first paid the special tax as required by law."

The two systems, the prohibitory system established by the law of the United States, and the

licensing system established by the law of the state, appear to be directly in conflict, and since the former is prevailing, it is impossible for the latter to stand.

If some part of the Brooks Law does remain in force, it is only a mere semblance of the original act. The part of it remaining in force would undoubtedly be that relating to the class of liquors not defined as intoxicating under the amendment. No part separately so relates. Such liquors in and of themselves are harmless and innocuous.

Where the United States has the right to legislate concerning intoxicating liquors, their powers are as broad as the police powers of the state before the amendment (*Ruppert v. Caffey, supra*), but "there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement" *(National Prohibition Cases, supra)*. There are limits beyond which the state may not go in this connection.

It has been decided that the limit of one-half of one per centum alcohol does not exceed the legal power, but the statute of Pennsylvania is not based on such distinction and includes liquors having an infinitesimal quantity of alcohol.

If it be possible for a law to exceed a legal limit in this respect, the Pennsylvania statute does so. Assuming that the limit of one-half of one per centum almost reaches the extreme, nevertheless the parts of the Brooks Law said to remain in effect operate in large part upon a class of liquors with which the state may not interfere.

Whether this remaining part of the statute is a method for authorizing the licensing of the sale of such liquors within the discretion of the Courts of Quarter Sessions to the extent necessary for the accommodation of the public, or whether it is an absolute prohibition thereof, it is an unwarranted and arbitrary interference with the rights of individuals to such an extent that it conflicts wtih the 14th Amendment.

It was one thing for the legislature of Pennsylvania to enact this law in its original form. It is another and wholly different thing to hold that this law is in force and effect as affecting and operating upon a class of liquors which Congress in legislation for enforcing the Amendment has chosen to treat as innocuous. It is suggested in the opinion of the Supreme Court that the licensing of the sale of such liquors is an appropriate method of enforcing the Amendment, although it is conceded that it was not enacted for this purpose. The admission negatives the force of the suggestion. The legislature of Pennsylvania did not determine that the licensing of the sales of liquor containing less than one-half of one per centum of alcohol was appropriate legislation for the enforcement of the Amendment. If certain parts of the Brooks Law, said to remain in effect, do not fail because of conflict with the 18th Amendment, such parts are in conflict with the 14th Amendment, and fail for that reason.

4.

CONCLUSIONS.

(a) If the Brooks Law be in fact a regulation of the sale of intoxicating liquors for beverage purposes, it conflicts with the 18th Amendment and the Volstead Act.

(b) If it be construed otherwise than as a law regulating the sale of intoxicating liquors for beverage purposes, it is an unwarranted, arbitrary and unreasonable interference with individual rights and conflicts with the 14th Amendment.

(c) Admittedly it is in large part in conflict with the 18th Amendment and the Volstead Act, and such parts of it as may not so conflict in no sense represent the will of the legislature of Pennsylvania, and its parts not being separable, it fails as a whole.

II.

THE EIGHTEENTH AMENDMENT.

1.

Section 1 is an Absolute Prohibition.

The amendment which became effective January 16, 1920, before the acts laid in the indictment were committed, is:

"Section 1: After one year from the ratification of this article, the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited.

Section 2: The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

The first section of the amendment in and of itself abolishes the manufacture, sale or transportation of intoxicating liquors for beverage purposes:

"6. The first section of the amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers, and individuals within those limits, and of its own force invalidates every legislative act whether by Congress, by a state legislature, or by a territorial assembly—which authorizes or sanctions what the section prohibits." *National Prohibition Cases,* 253 U. S. 350.

In and of itself it conferred upon Congress a power to legislate for its enforcement:

"In the first place, it is indisputable, as I have stated, that the first section imposes a general prohibition which it was the purpose to make universally and uniformly operative

and efficacious. In the second place, as the prohibition did not define the intoxicating beverages which it prohibited, in the absence of anything to the contrary, it clearly, from the very fact of its adoption, cast upon Congress the duty, not only of defining the prohibited beverages, but also of enacting such regulations and sanctions as were essential to make them operative when defined."

Concurring opinion of Chief Justice White in *National Prohibition Cases*, 253 U. S. 350, (390).

Constitution, Art. I, Sec. 8, Clause 18.

Section 1 of the 13th Amendment is closely analogous. In the opinion of Justice Bradley in the *Civil Right Cases*, 109 U. S. 3, it is said (20):

"This amendment, as well as the 14th, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States."

Section 1 of the 18th Amendment is an absolute declaration that the traffic in intoxicating liquors for beverage purposes shall not exist in any part of the United States. Before the amendment, the control of that subject matter, intoxicating liquors for beverage purposes, was exclusively within the states except as affected by the exercise by Congress of its taxing powers, its authority to regulate interstate commerce, and the exercise of like powers.

As the subject matter of the exercise of the police power for the purpose of affording protection against the evils resulting from its unregulated and unrestrained manufacture and sale, it was exclusively within the several sovereignties of the respective states, and they might do as they severally determined, leave it unregulated, regulate it, or prohibit it altogether.

All of this power of control is destroyed by Section 1 of the 18th Amendment. The whole subject matter of the manufacture, importation, exportation, transportation and sale of intoxicating liquors for beverage purposes is lifted out of the control of the states and by the fundamental law of the United States absolutely prohibited. The amendment transferred this subject matter from the sovereignty of the respective states to the sovereignty of the United States.

The plain object and purpose of the amendment was to destroy the governmental power of the

several states in respect of the subject matter embraced in it. The police power of the state is actually abolished so far as intoxicating liquors for beverage purposes are concerned.

This question has been considered by the New Jersey Court of Errors and Appeals in *Katz v. Eldridge*, not yet reported, and a copy of the opinion of Gummere, Chief Justice, and Kalish, Justice, are printed in the Appendix "H" and "I." Each of these Justices expressed the view that the effect of the 18th Amendment was to destroy the police power of the States in so far as the States formerly could exercise such power in regulating the traffic in intoxicating liquors.

This case construed and held invalid, by a divided court, an act of the New Jersey Legislature, which in many respects re-enacted the National Prohibition Act as a State statute, but made the violation of certain sections thereof mere disorderly conduct and not crimes.

Aside from the power to enforce the amendment conferred by Section 2, which is hereafter considered, the states have no power, function or office in connection with intoxicating liquors for beverage purposes.

Since the prohibition of Section 1 is national, Congress, the agency of national power, has the right in virtue of that section of the amendment to define prohibited beverages and enact suitable regulations and provide adequate penalties to effectuate and enforce it.

2.

The Right of the States is to Enforce the Amendment, as Defined and Sanctioned by Congress, by Appropriate Legislation.

Section 2 of the Amendment is:

> "The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation,"

which confers or grants the power to enforce.

So far as Congress is concerned, the power was granted or conferred. Since the same power is lodged in the states by the same words that confer it upon Congress, the fair inference in the absence of other circumstances is that it was in like manner conferred upon the states and not reserved to them.

Since Section 1 in and of itself destroyed the police powers of the states so far as intoxicating liquors for beverage purposes is concerned, the only power of the states in connection therewith must be that granted by the Amendment itself.

The power thus granted is limited to enforcement of the Amendment, but as Congress had power and right independently of Section 2, to prescribe definitions of intoxicating liquors for beverage purposes and to make regulations and provide penalties, the power conferred by Section 2 is additional or supplemental to that, and the states have no greater or different power from that specifically conferred upon Congress.

"In the third place, when the second section is considered with these truths in mind it becomes clear that it simply manifests a like purpose to adjust, as far as possible, the exercise of the new powers cast upon Congress by the Amendment to the dual system of government existing under the Constitution. In other words, dealing with the new prohibition created by the Constitution, operating throughout the length and breadth of the United States, without reference to state lines or the distinctions between state and Federal power, and contemplating the exercise by Congress of the duty cast upon it to make the prohibition efficacious, it was sought by the second section to unite national and state administrative agencies in giving effect to the Amendment and the legislation of Congress enacted to make it completely operative.

Mark the relation of the text to this view, since the power which it gives to state and nation is not to construct or perfect or cause the Amendment to be completely operative, but as already made completely operative, to enforce it. Observe also the words of the grant which confines the concurrent power given to legislation appropriate to the purpose of enforcement."

Concurring opinion of Chief Justice White in *National Prohibition Cases* (391).

In legislating for the enforcement of the Amendment, the states do not act in virtue of their police powers inherently possessed as sovereigns, but in virtue of a power conferred upon them by the peo-

ple of the United States. In this respect they are administrative agents or mandataries of the United States.

It was decided in National Prohibition Cases:

> "7. The second section of the Amendment —the one declaring 'the Congress and the several states shall have concurrent power to enforce this article by appropriate legislation'— does not enable Congress or the several states to defeat or thwart the prohibition, but only to enforce it by appropriate means."

and again:

> "8. The words 'concurrent power' in that section do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several states or any of them; nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs."

It was not contemplated that there should be two sovereignties defining intoxicating liquors for beverage purposes. Section 1 absolutely prohibited intoxicating liquors for beverage purposes. The United States thereby became sovereign so far as that subject is concerned. Section 2 did not create the states sovereigns in that respect. On the other

hand it granted to Congress and the several states concurrent power to enforce the Amendment, and it did not enable Congress or the several states to defeat or thwart the prohibition, but only to enforce it by appropriate means.

The definitions formulated by the Volstead Act, its penalties and all the other regulations provided by it are constitutional.

It defined and sanctioned the Amendment, and the several states have the right, if they so desire, to enforce the Amendment as thus defined and sanctioned by appropriate legislation.

It is quite analogous to the naturalization laws. Congress has power to enact such laws. In so doing it provided for their administration and enforcement in the state courts.

In enacting legislation for the enforcement of Section 1 of the 18th Amendment Congress could have provided that it might be enforced in the state courts, even if Section 2 did not exist, but it would not be required to do so.

Section 2 does not leave it optional with Congress. Each state may determine for itself, whether it will enforce the Amendment. If it determines to do so, it is the Amendment "as already made completely operative" by Congressional action that is to be enforced.

These questions have been considered by the Supreme Courts of a number of states. The leading cases are:

Commonwealth v. Nickerson, 128 N. E. 273 (Mass.)
State v. District Court , 194 Pac. 308 (Mont.)
State v. Force, 105 S. E. 334 (N. C.)
People v. Folley, 184 N. Y. Sup. 270.
Allen v. Commonwealth, 105 S. E. 589 (Va.)
Jones v. Hicks, 104 S. E. 771 (Ga.)
State v. Green, 86 So. 919 (La.)
Hall v. Moran, 89 So. 104 (Fla.)
Burroughs v. Moran, 89 So. 111 (Fla.)
Johnson v. State, 89 So. 114 (Fla.)

These cases proceed upon two different theories which are clearly shown in *Allen v. Commonwealth* and *Commonwealth v. Nickerson.*

The theory on which *Allen v. Commonwealth* and kindred cases proceed is that the commission of the acts prohibited by the 18th Amendment may be punished by the states under their police power. The following from the opinion in the Allen case clearly states the view: (592)

> "The state has legislated and may still further legislate, if it so desires, in its own separate domain in its exercise of the state police power expressly reserved with respect to the state offenses as aforesaid, with which legislation the federal government is powerless to interfere under the Eighteenth Amendment. The fact that the state, by the Eighteenth Amendment, is given the novel power to go

outside of its own original domain and aid in legislation to enforce such amendment, and hence to legislate with respect to the federal offenses thereby created, can in no way diminish or impair the legislative power of the state within its own exclusive domain."

If this view be correct, the same act may constitute two offenses, one against the Federal law and one against the state law. The act done is in violation of the 18th Amendment and is a violation of the law of that sovereignty. If the state in the exercise of its police power may by a law operating directly on the same subject matter make the same act an offense, it is because its power is that of a sovereign.

It is conceivable that cases might arise where the state independently of any regulation of intoxicating liquors for beverage purposes and in a legitimate exercise of its police power for the accomplishment of some other legitimate purpose include certain acts which would involve the selling of intoxicating liquors, but there would in such instances be no conflicting claims of rival sovereigns because each would be operating within its own proper sphere. It would be a violation of the Amendment where the sovereignty of the United States was complete, and it would be a violation of the laws of the state because indirectly involved in the accomplishment of what the state had the right to do. *Savage v. Jones,* 225 U. S. 501 (524).

That, however, is not the case here. The laws of the state and the Amendment operate directly

upon the same thing, "intoxicating liquors for beverage purposes."

If the states have a police power in this respect, the doing of an act in violation of the 18th Amendment constitutes two offenses:

> "Subjection to both state and National law in the same matter might often be impossible. The power to punish a sale to an Indian implies an equal power to punish a sale by an Indian. If by National law a sale to or by an Indian was punished solely by fine, how could both laws be enforced in respect to the same sale? The question is not whether a particular right may be enforced in either a court of the state or one of the Nation, but whether two sovereignties can create independent duties and compel obedience."

Answering the question, Justice Brewer said: (507)

> "It is true the same act may often be a violation of both the state and Federal law, but it is only when those laws occupy different planes. Thus, a sale of liquor may be a violation of both the state and Federal law, in that it was made by one who had not paid the revenue tax and received from the United States a license to sell, and also had not complied with the state law in reference to the matter of state license. But in that case the two laws occupy different planes—one that of revenue and the other that of police regulation. There is no suggestion in the present case of a violation of the internal revenue law of the Nation,

but the conviction is sought to be upheld under the act of 1897, a mere statute of police regulation." *In re Heff*, 197 U. S. 488 (507).

This case involved the status of an Indian and was reversed on this point in *U. S. v. Nice*, 241 U. S. 591, but that did not affect the principles declared in the quotation.

The amendment intended to create a single sovereignty having control of intoxicating liquors for beverage purposes and did not leave in the states any police power in respect of this subject matter. They lost their several sovereignties in this respect and gained a concurrent power with Congress to enforce the Amendment by appropriate legislation.

The other cases proceed on the theory that existing legislation of the states continues in force in aid of the enforcement of the amendment insofar as such provisions can be said to be concurrent and exerted in support of the main object of the 18th Amendment and make contribution to its general aim.

Commonwealth v. Nickerson is a representative case of this class. The court there reached six conclusions:

A. The words "concurrent power" as used in the amendment have not been defined by the Supreme Court of the United States.

B. By the words of Section 2 of the 18th Amendment, the state possesses continuous and independent power to enact legislation actually tending to render efficient through

its executive and judicial departments the terms of that amendment which may differ in definitions, administrative agencies and penalties from that of Congress, but cannot be antagonistic thereto.

C. If the words of the Amendment do not preserve and recognize such legislative jurisdiction in the states, they are broad enough to authorize the enactment of statutes whose plain purpose and natural effect is the enforcement of the chief end of the amendment and not repugant to the acts of Congress.

These three conclusions were unanimously concurred in; the following three which are quoted in full were concurred in by a majority of the court:

"D. The provisions of R. L. c. 100, concerning the prohibitions of sales of intoxicating liquors, the definition of intoxicating liquor, and the penalties for the violations of these and similar provisions and the means of enforcing them, constitute a valid exercise of the legislative power of the commonwealth under both propositions B and C just stated.

E. Those provisions of R. L. c. 100, set forth in proposition D, were not abrogated or annulled by the Eighteenth Amendment, but are in force under the terms of that amendment, although it was adopted subsequent to the enactment of R. L. c. 100.

F. Even if the definition of intoxicating liquors given in R. L. c. 100, sec. 2, in so far as it fails to define as intoxicating that liquor which contains one-half of 1 per centum of alcohol or more up to and including 1 per cent.

of alcohol no longer has validity since the enactment of the Volstead Act, the present complaint is well founded under the remaining enforceable provisions of R. L. c. 100."

That case recognizes legislation by the states different from that of Congress and, therefore, creates a condition where there is possibility of conflict between national and state legislation, in which event one would have to yield to the other. It is claimed in some of the cases that, in the event of such conflict, since the law of the United States is paramount, the state enactments would have to yield but, as shown by Chief Justice White in his concurring opinion in the *National Prohibition Cases,* this cannot be. The amendmet does not contemplate the possibility of conflict between national and state legislation. The Chief Justice said:

"It is said, conceding that the concurrent power given to Congress and to the states does not, as a prerequisite, exact the concurrent action of both, it nevertheless contemplates the the possibility of action by Congress and by the states, and makes each action effective; but, as under the Constitution and authority of Congress in enforcing the Constitution is paramount, when state legislation and congressional action conflict, the state legislation yields to the action of Congress as controlling. But as the power of both Congress and the states in this instance is given by the Constitution in one and the same provision, I again

find myself unable to accept the view urged because it ostensibly accepts the constitutional mandate as to the concurrence of the two powers and proceeds immediately by way of interpretation to destroy it by making one paramount over the other."

If this be the correct view, the amendment may have two meanings and effects in each state, the one prescribed by the act of Congress, the other by state legislation. One may be much more inclusive than the other. One may be much more severe in its penalties than the other. Thus the amendment might well have 49 different meanings and effects, one given to it by each of the 48 states, and the other by the act of Congress. The possibility of the existence of such a situation is not to be contemplated unless inexorably required by some specific terms of the amendment.

Nothing in the Amendment so requires. The concurrent power conferred upon both Congress and the states is to enforce the Amendment by appropriate legislation.

"Limiting the concurrent power to enforce given by the second section to the purposes which I have attributed to it, that is, to the subjects appropriate to execute the Amendment as defined and sanctioned by Congress, I assume that it will not be denied that the effect of the grant of authority was to confer upon both Congress and the states power to do things which otherwise there would be no right

to do." Concurring opinion of Chief Justice White, *National Prohibition Cases.*

Limiting as thus indicated the power of the states to the enforcement by appropriate legislation of the amendment as defined and sanctioned by Congress resolves the difficulties and conflicts otherwise resulting from the amendment.

The thing that the state may do is not create or sanction the amendment, but enforce it as created, defined and sanctioned.

If the legislation of the states be confined to such as is suitable and proper to enable them as administrative agencies to enforce the amendment, the difficulties of construction are resolved.

The amendment then has the same meaning throughout the land in both state and nation. Its prohibitions, operation and effect are uniform. The consequences of its violation are the same anywhere and everywhere in both Federal and State courts. There is then no possibility of conflict between Federal and State law. There is no supremacy of Federal law over State law, in so far as the concurrent power of both nation and states is concerned. There is then no divided sovereignty, no dual sovereignty, no attempt to create independent duties, and no effort of rival sovereigns to compel obedience.

The decision against which the writ of error was sued out, is based on the proposition that the Brooks Law is Pennsylvania's police power

method of regulating not the sale of intoxicating liquors, but of that class in which the former are generally included. It is referable to the police power of the state.

Some suggestion is also made that in a sense it may be an aid in the enforcement of the 18th Amendment, but it was admitted it was not enacted for this purpose.

The 18th Amendment worked a radical change. Its policy is wholly different from that of the State of Pennslyvania. There is no consistency between the two. A state statute under the provisions of which intoxicating liquors for beverage puropses could be sold and furnished to the extent necessary for the accommodation of the public, cannot in any legal sense be considered as appropriate legislation for the enforcement of an amendment to the Constitution of the United States which had no existence when the statute was enacted and which absolutely prohibits that which the statute permits to be legally done.

3.

The States Under Their Concurrent Power May Not Interfere With Such Liquors as the Act of Congress Does Not Define as Intoxicating.

Liquors not intoxicating are not prohibited by the amendment, but Congress may include certain liquors of this character in enforcement legisla-

tion, but there are limits beyond which Congress cannot go along this line.

Liquors which Congress has excluded from the category of intoxicating liquors are harmless and innocuous and to use, sell, and traffic in such liquors is an immunity with which the state may not interfere except in the exercise of its police power which cannot now be grounded on the connection and association of such liquors with intoxicating liquors.

In *Hall v. Moran*, 89 So. 104, one of the Florida cases cited, the Supreme Court of that state held that the state statute limiting the quantity of liquor a citizen might have in his possession for his own use to four (4) quarts, was not enforcible as the Volstead Act did not limit the amount that a person might so have.

The right of a citizen to have such liquors for his own use is regarded as an immunity. Point 9 of the syllabus by the Court is:

> "The Eighteenth Amendment extends the Federal power to the interstate possession of intoxicating liquors for beverage purposes and does not prohibit the possession or consumption of such liquors, and privileges and immunities duly conferred by Congress upon citizens of the United States to possess and consume intoxicating liquors, unconnected with the organic prohibitions, may be protected by the Fourteenth Amendment from abridgment by state laws."

4.

CONCLUSIONS.

(a) Section 1 of the amendment is an absolute prohibition and in effect destroyed the police power of the states so far as intoxicating liquors for beverage purposes is concerned.

(b) In lieu of the powers which the states formerly had in relation to intoxicating liquors for beverage purposes, they now have in virtue of Section 2 of the amendment power to enforce it by appropriate legislation in the exercise of which they are to enforce the amendment as made completely operative by Congressional action.

(c) Acts done in violation of the amendment may be punished by procedings in the Federal courts under the act of Congress or by the courts of a state within which they were committed if the state has enacted appropriate legislation to enforce the amendment, but it is the amendment that is being enforced and the violation of it that is punished.

(d) The states may not interfere with such liquors as Congress has defined as not intoxicating.

Wherefore, it is most respectfully submitted that the judgment of the Supreme Court of Pennsylvania affirming the conviction of the Plaintiff in Error should be reversed.

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APPENDIX.

A

THE BROOKS LAW.

An Act

To Restrain and Regulate the Sale of Vinous and Spirituous, Malt or Brewed Liquors, or Any Admixtures Thereof.

Section 1. Be it enacted, etc., that it shall be unlawful to keep or maintain any house, room or place, hotel, inn or tavern, where any vinous, spirituous, malt or brewed liquors, or any admixture thereof, are sold by retail, except a license therefor shall have been previously obtained as hereinafter provided.

Section 2. Licenses for the sale of vinous, spirituous, malt or brewed liquors at retail in quantities not exceeding one quart, shall only be granted to citizens of the United States of temperate habits and good moral character.

Section 3. Such licenses may be granted only by the court of quarter sessions of the proper county, and shall be for one year, from a date fixed by rule or standing order of said court. The said

court shall fix by rule or standing order a time at which application for said licenses shall be heard, at which time all persons applying or making objections to applications for licenses may be heard by evidence, petition, remonstrance or counsel: Provided, That licenses under previous laws shall not be granted later than June thirtieth of this year.

Section 4. Every person intending to apply for a license as aforesaid in any city or county of this Commonwealth, from and after the passage of this act, shall file with the clerk of the court of quarter sessions of the proper county his, her or their petition, at least three weeks before the first day of the sessions of the court at which the same is to be heard, and shall at the same time pay said clerks five dollars for expenses connected therewith; and said clerk shall cause to be published three times in two newspapers, designated by the said court, a list containing the names of all such applicants, their respective residences and the place for which application is made; the first publication shall be not less than fifteen nor more than twenty-five days before the time fixed by the court: Provided, That no license shall be granted under the provisions of this act to any person to sell in any room where groceries are sold at wholesale or retail: Provided also, That in cities of the first class in the month of January in each and every year, it shall be the duty of the mercantile

appraisers to return under oath, together with the list of mercantile taxes, all licensed and unlicensed hotels, taverns, inns, restaurants or saloons, engaged in selling intoxicating liquors, and shall also return a duplicate list of said licensed and unlicensed hotels, taverns, inns, restaurants or saloons, to the clerk of the court of quarter sessions, and the said list of licensed and unlicensed hotels, taverns, inns, restaurants or saloons shall be published in the manner now prescribed for the publication of mercantile appraisers' lists, and said list shall contain the name and amount paid by each licensee, and a list of every unlicensed hotel, tavern, inn, restaurant or saloon; and it shall be their further duty to return to the district attorney in said cities of the first class the name and residence of every proprietor or keeper of any unlicensed hotel, tavern, inn, restaurant or saloon, together with the location thereof; and it shall be the duty of the district attorney to forthwith proceed to prosecute each and every offender according to law. And for each and every license granted by the court for any hotel, tavern, inn, restaurant or saloon, the mercantile appraisers shall receive the sum of two dollars and fifty cents, the said sum to be paid by the applicant or applicants for said license.

Section 5. Said petition shall contain:

First. The name and present residence of applicant, and how long he has there resided;

Second. The particular place for which a license is desired;

Third. The place of birth of said applicant, and if a naturalized citizen, where and when naturalized;

Fourth. The name of owner of premises;

Fifth. That the place to be licensed is necessary for the accommodation of the public;

Sixth. That none of the applicants are in any manner pecuniarily interested in the profits of the business conducted at any other place in said county, where any of said liquors are sold or kept for sale;

Seventh. That the applicant is the only person in any manner pecuniarily interested in the business so asked to be licensed, and that no other person shall be in any manner pecuniarily interested therein, during the continuance of the license;

Eighth. Whether applicant, or any of them, has had a license for the sale of liquors in this Commonwealth, during any portion of the year preceding this application, revoked;

Ninth. The names of no less than two reputable freeholders of the ward or township where the

liquor is to be sold, who will be his, her, or their sureties on the bond, which is required, and a statement that each of said sureties is a bona fide owner of real estate in the said county worth over and above all incumbrances the sum of two thousand dollars, and that it would sell for that much at public sale, and that he is not engaged in the manufacture of spirituous, vinous, malt or brewed liquors;

Tenth. This petition must be verified by affidavit of applicant, made before the clerk of the court, a magistrate, notary public, or justice of the peace, and, if any false statement is made in any part of said petition, the applicant or applicants shall be deemed guilty of the crime of perjury, and upon indictment and conviction shall be subject to its penalties;

Section 6. There shall be annexed to such petition a certificate, signed by at least twelve reputable qualified electors of the ward, borough or township in which such liquors are to be sold, setting forth that they have been acquainted with the applicant or applicants, that they have good reason to believe that each and all the statements contained in the petition are true, and they therefore pray that the prayer of said petition be granted and that the license prayed for issue.

Section 7. The said court of quarter sessions shall hear petitions from residents of the ward,

borough or township, in addition to that of the applicant, in favor of and remonstrance against the application for such license, and in all cases shall refuse the same whenever, in the opinion of the said court having due regard to the number and character of the petitioners for and against such application, such license is not necessary for the accommodation of the public and entertainment of strangers or travelers, or that the applicant or applicants is or are not fit persons to whom such license should be granted; and, upon sufficient cause being shown or proof being made to the said court that the party holding a license has violated any law of this Commonwealth relating to the sale of liquors, the court of quarter sessions shall, upon notice being given to the person so licensed, revoke the said license.

Section 8. That all persons licensed to sell at retail any vinous, spirituous, malt or brewed liquors, or any admixture thereof, in any house, room or place, hotel, inn or tavern, shall be classified and required to pay annually for such privileges as follows: Persons licensed to sell by retail, resident in cities of the first, second and third class, shall pay the sum of five hundred dollars; those resident in all other cities, shall pay three hundred dollars; and those resident in boroughs, shall pay the sum of one hundred and fifty dollars; those resident in townships shall pay the sum of seventy-five dollars; which sum shall be

divided in portions, as follows: In cities of the first class, four-fifths shall be paid for the use of the city and county, and one-fifth for the use of the Commonwealth; in cities of the second and third class, two-fifths shall be paid for the use of the city, two-fifths for the use of the proper county, and one-fifth for the use of the Commonwealth; in all other cities or boroughs, three-fifths shall be paid for the use of such city or borough, one-fifth for the use of the proper county, and one-fifth for the use of the Commonwealth; in towsnhips, one-half shall be paid for the use of the townships, one-fourth for the use of the proper county and one-fourth for the use of the Commonwealth. The sums so paid for the use of the townships to be applied to keeping the roads of such townships in good repair; Provided, That counties, cities, boroughs and townships, receiving parts of said licenses, shall bear their proportionate share of the expenses attending the collection of the same: And provided further, That the treasurers of the several counties shall appropriate for their own use the same commissions on the amounts retained for the use of their respective counties as they are now authorized to return by law out of the moneys they return to the State.

Section 9. If any person or persons shall neglect or refuse to pay to the city or county treasurer the sum of money directed in section eight within fifteen days after his, her or their application for

license has been granted by said court, then and in that case the said grant shall be deemed and held revoked, and no license issued. It shall be the duty of the person or persons, whose application has been granted by the said court, to pay the said sum of money to the said treasurer within the said fifteen days, and forthwith produce to and file with the clerk of court the receipt of the said treasurer therefor, and upon any default, the said clerk shall forthwith mark said application and grant "revoked."

Section 10. That the license shall not be issued to any person or persons until he, she or they shall have executed a bond to the Commonwealth, and a warrant of attorney to confess judgment, in the penal sum of two thousand dollars, with two sufficient sureties to be approved by the court granting such license, conditioned for the faithful observance of all the laws of this Commonwealth relating to the selling or furnishing vinous, spirituous, malt or brewed liquors, or any admixture thereof, and to pay all damages, which may be recovered in any action which may be instituted against him, her or them under the provisions of any act of Assembly, and all costs, fines and penalties, which may be imposed upon him, her or them, under any indictment for violating this act, or any other act of Assembly relating to selling or furnishing liquors as aforesaid; and the said bond shall be filed in the office of the clerk of the

said court for the use and benefit of all persons interested therein.

Section 11. The constable of the respective wards, boroughs or townships in each county shall, in the first week in each term of the court of quarter sessions make returns, under oath, of all the places in his bailiwick where vinous, spirituous, malt or brewed liquors, or any admixture thereof, are kept for sale or sold, except stores kept by druggists and apothecaries, stating which of said places are licensed under this act and which are unlicensed; and it shall be the special duty of the judge of said court to see that this return is faithfully made. And on failure of any constable to comply with this provision, or if it be found upon examination or inquiry by said court that any constable has either wilfully or negligently omitted to return all such houses and the names of the proprietors thereof in his bailiwick, he shall be guilty of wilfully or negligently making a false return, and the court shall suspend him from said office, and direct the district attorney to indict and try said officer, and if found guilty he shall be fined in a sum not exceeding five hundred dollars and undergo an imprisonment, either simple or solitary, not exceeding two years, or both, or either, in the discretion of the court.

Section 12. It shall be the duty of each constable in the county to visit, at least once in each month, all places within their respective juris-

dictions, where any of said liquors are sold or kept, to ascertain if any of the provisions of this or any act of Assembly relating to the sale or furnishing of such liquors have been or are being violated, and whenever any of the officers above mentioned shall learn of any such violation, it shall be his duty to forthwith make written returns of the same to the court of quarter sessions, with the names of the witnesses, and to do whatever shall be in his power to bring the offender to justice; and upon any neglect or refusal of any of said officers to perform the aforesaid duty the said court shall impose the same penalties provided in section eleven of this act.

Section 13. Every person receiving such license to sell spirituous, vinous, malt or brewed liquors, or any admixture thereof, shall frame his license under a glass, and place the same, so that it shall at all times be conspicuous and easily read, in his chief place of making sale, and no such license shall authorize sales by any person who shall neglect this requirement.

Section 14. No licensee, who shall sell liquors by less measure than one quart, shall trust or give credit therefor, under penalty of losing and forfeiting such debt; and no action shall be maintained or recovery had in any case for the value of liquors sold in violation of the provisions of this section, and defense may be taken in said cases against such recovery without special plea or notice.

Section 15. Any person who shall hereafter be convicted of selling or offering for sale any vinous, spiritous, malt or brewed liquors, or any admixture thereof, without a license, shall be sentenced to pay a fine of not less than five hundred dollars, nor more than five thousand dollars, and undergo an imprisonment in the county jail of not less than three months, nor more than twelve months. Any person having license who shall hereafter be convicted of violating any of the provisions of the license laws shall be subjected to a fine of not less than one hundred dollars, nor more than five hundred dollars, and for any second offense whereof he shall be convicted of not less than three hundred, nor more than one thousand dollars, and for any third offense whereof he shall be convicted a fine of not less than five hundred dollars, and not more than five thousand dollars, and undergo an imprisonment in the county jail not less than three months, or more than twelve months, or both, or either at the discretion of the court. Any person convicted of more than one offense shall not again be licensed in any city or county of the Commonwealth; and the license of any person permitting the customary visitation of disreputable persons, or keeping a disorderly place, may, upon proof, be at any time revoked by the court, and when thus revoked the same party shall not be again licensed in any city or county of the Commonwealth.

Section 16. That druggists and apothecaries

shall not be required to obtain a license under the provisions of this act, but they shall not sell intoxicating liquors, except upon the written prescription of a regularly registered physician; alcohol, however, or any preparations containing the same, may be sold for scientific, mechanical or medicinal purposes. Anyone violating the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be subject to the same penalties as are provided in the fifteenth section of this act: Provided, That no spirituous, vinous, malt or brewed liquors shall be sold or furnished to any person more than once on any one prescription of a physician: And provided further, That any person who shall wilfully prescribe any intoxicatiing liquors as a beverage to persons of known intemperate habits shall be guilty of a misdemeanor, and upon conviction thereof shall be subject to the same penalties and fines as are prescribed in section seventeen.

Section 17. That it shall not be lawful for any person with or without license to furnish by sale, gift or otherwise to any person any spirituous, vinous, malt or brewed liquors, on any day upon which elections are now or hereafter may be required to be held, nor on Sunday, nor at any time to a minor, or a person of known intemperate habits, or a person visibly affected by intoxicating drink, either for his or her use, or for the use of

any other person, or to sell or furnish liquors to any person on a pass-book or order on a store, or to receive from any person any goods, wares, merchandise, or provisions in exchange for liquors, shall be held and deemed a misdemeanor, and upon conviction thereof the offender shall be fined not less than fifty nor more than five hundred dollars, and undergo an imprisonment of not less than twenty nor more than ninety days.

Section 18. Any house, room or place, hotel, inn or tavern, where vinous, spirituous, malt or brewed liquors are sold, offered for sale, drank or given away in violation of any law of this Commonwealth, shall be held and declared a nuisance and shall be abated by proceedings at law or equity. All expenses connected with such proceedings, including a counsel fee of twenty dollars for the counsel of complainant, shall be paid by defendant or defendants.

Section 19. All local laws fixing a license rate or fee less than is provided for in this act be and the same are hereby repealed: Provided, however, That none of the provisions of this act shall be held to authorize the sale of any spirituous, vinous, malt or brewed liquors, or any admixture thereof, in any city, county, borough or township having special prohibitory laws.

Approved: The 13th day of May, A. D. 1887.

JAMES A. BEAVER.

B

ACT OF MAY 5, 1921, P. L. 407.

An Act

Amending an act approved the thirteenth day of May one thousand eight hundred and eighty-seven entitled "An act to restrain and regulate the sale of vinous and spirituous malt or brewed liquors or any admixture thereof" by prohibiting the manufacture sale offering for sale transportation importation exportation furnishing or possession for beverage purposes of anything determined and found to be intoxicating by Act of Congress passed pursuant to and in the enforcement of the Constitution of the United States of America and by restraining and regulating the sale of vinous spirituous malt or brewed liquors or any admixtures thereof fit for beverage purposes other than such as are from time to time determined and found to be intoxicating by any such Act of Congress.

Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met and it is hereby enacted by the authority of the same That section one of an act approved the thirteenth day of May one thousand eight hundred and eighty-seven entitled "An act to restrain and regulate the sale of vinous and spirituous malt or brewed liquors or any admixtures thereof" (Pamphlet Laws one hundred and eight) which now reads as follows:

"Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met and it is hereby enacted by the authority of the same That it shall be unlawful to keep or maintain any house room or place hotel inn or tavern where any vinous spirituous malt or brewed liquors or any admixtures thereof are sold by retail except a license therefor shall have been previously obtained as hereinafter provided" is hereby amended to read as follows:

Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met and it is hereby enacted by the authority of the same *That the phrase "vinous spirituous malt or brewed liquors" the phrase "spirituous vinous malt or brewed liquors" and the word "liquors" as used in this act shall mean vinous spirituous malt or brewed liquors fit for beverage purposes other than such as are from time to time determined and found to be intoxicating by Act of Congress passed pursuant to and in the enforcement of the Constitution of the United States of America.*

The phrase "intoxicating liquors" shall mean anything found and determined from time to time to be intoxicating by Act of Congress passed pursuant to and in the enforcement of the Constitution of the United States of America.

It shall be unlawful to keep or maintain any

house room or place hotel inn or tavern where any vinous spirituous malt or brewed liquors or any admixture thereof are sold by retail except a license therefor shall have been previously obtained as hereinafter provided.

Section 2. That section four of said act which now reads as follows:

Section 4. Every person intending to apply for a license as aforesaid in any city or county of this Commonwealth from and after the passage of this act shall file with the clerk of the court of quarter sessions of the proper county his her or their petition at least three weeks before the first day of the sessions of the court at which the same is to be heard and shall at the same time pay said clerk five dollars for expenses connected therewith and said clerk shall cause to be published three times in two newspapers designated by the said court a list containing the names of all such applicants their respective residences and the place for which application is made the first publication shall be not less than fifteen nor more than twenty-five days before the time fixed by the court Provided That no license shall be granted under the provisions of this act to any person to sell in any room where groceries are sold at wholesale or retail Provided also That in cities of the first class in the month of January in each and every year it shall be the duty of the mercantile appraisers to return under oath together with the list of mercantile taxes all

licensed or unlicensed hotels taverns inns restaurants or saloons engaged in selling *intoxicating liquors* and shall also return a duplicate list of said licensed and unlicensed hotels taverns inns restaurants or saloons to the clerk of the court of quarter sessions and the said list of licensed and unlicensed hotels taverns inns restaurants or saloons shall be published in the manner now prescribed for the publication of mercantile appraisers' lists and said list shall contain the name and amount paid by each licensee and a list of every unlicensed hotel tavern inn restaurantor saloon and itshall be their further duty to return to the district attorney in said cities of the first class the name and residence of every proprietor or keeper of any unlicensed hotel tavern inn restaurant or saloon together with the location thereof and it shall be the duty of the district attorney to forthwith proceed to prosecute each and every offender according to law And for each and every license granted by the court for any hotel tavern inn restaurant or saloon the mercantile appraisers shall receive the sum of two dollars and fifty cents the said sum to be paid by the applicant or applicants for said license" is hereby amended to read as follows:

Section 4. Every person intending to apply for a license as aforesaid in any city or county of this Commonwealth from and after the passage of this act shall file with the clerk of the court of quarter sessions of the proper county his her or their petition at least three weeks before the first day of the

sessions of the court at which time the same is to be heard and shall at the same time pay said clerk five dollars for expenses connected therewith and said clerk shall cause to be published three times in two newspapers a list containing the names of all such applicants their respective residences and the place for which application is made the first publication shall not be less than fifteen nor more than twenty-five days before the time fixed by the court Provided That no license shall be granted under the provisions of this act to any person to sell in any room where groceries are sold or in any place of resort for minors. Provided also That in cities of the first class in the month of January in each and every year it shall be the duty of the mercantile appraisers to return under oath together with the list of mercantile taxes all licensed and unlicensed hotels taverns inns restaurants or saloons engaged in selling *vinous spirituous malt or brewed liquors* and shall also return a duplicate list of said licensed and unlicensed hotels taverns inns restaurants or saloons to the clerks of the court of quarter sessions and the said list of licensed and unlicensed hotels taverns inns restaurants or saloons shall be published in the manner now prescribed for the publication of mercantile appraisers' lists and said list shall contain the name and amount paid by each licensee and a list of every unlicensed hotel tavern inn restaurant or saloon and it shall be their further duty to return to the district attorney in said cities of the first class the name and residence of every proprietor or keeper of any unlicensed hotel

tavern inn restaurant or saloon together with the location thereof and it shall be the duty of the district attorney to forthwith proceed to prosecute each and every offender according to law. And for each and every license granted by the court for any hotel tavern inn restaurant or saloon the mercantile appraisers shall receive the sum of two dollars and fifty cents the said sum to be paid by the applicant for said license.

Section 3. That section five of said act which as amended by an act approved the twenty-fourth day of April Anno Domini one thousand nine hundred and one entitled:

"An act amending the ninth clause of the fifth section and the tenth section of the act entitled 'An act to restrain and regulate the sale of vinous spirituous malt or brewed liquors or any admixture thereof' approved the thirteenth day of May Anno Domini one thousand eight hundred and eighty-seven authorizing bondsmen from any part of the county or a security trust or surety company organized under the laws of this State or any other state of the United States to execute the bond required and fixing the amount thereof and providing for the filing and approval thereof" now reads as follows:

Section 5. Said petition shall contain:

First. The name and present residence of applicant and how long he has there resided.

Second. The particular place for which a license is desired.

Third. The place of birth of said applicant and if a naturalized citizen where and when naturalized.

Fourth. The name of owner of premises.

Fifth. That the place to be licensed is necessary for the accommodation of the public.

Sixth. That none of the applicants are in any manner pecuniarily interested in the profits of the business conducted at any other place in said county where any of said liquors are sold or kept for sale.

Seventh. That the applicant is the only person in any manner pecuniarily interested in the business so asked to be licensed and that no other person shall be in any manner pecuniarily interested therein during the continuance of the license.

Eighth. Whether applicant or any of them has had a license for the sale of liquors in this Commonwealth during any portion of the year preceding this application revoked.

Ninth. The names of no less than two reputable freeholders of the county where the liquor is to be sold who will be his or her or their sureties on the bond which is required and a statement that each of said sureties is a bona fide owner of real estate in said county worth over and above all incumbrances the sum of two thousand ($2,000) dollars and that it would sell for that much at public sale and that he is not engaged in the manufacture of spirituous vinous malt or brewed liquors. Provided That when any person is surety upon more than one bond he shall certify that he is worth four thousand ($4,000) dollars over and above all incumbrances and over and above any previous bond he may be on as surety or of a security trust or surety company organized and existing under the laws of this Commonwealth or of any other State of the United States of America duly authorized to do business within the State of Pennsylvania by the Insurance Commissioner thereof.

Tenth. This petition must be verified by affidavit of applicant made before the clerk of the court a magistrate notary public or justice of the peace and if any false statement is made in any part of said petition the applicant or applicants shall be deemed guilty of the crime of perjury and upon indictment and conviction shall be subject to its penalties" is hereby further amended to read as follows:

Section 5. Said petition shall contain:

First. The name and present residence of the applicant and how long he has there resided.

Second. The particular place for which a license is desired.

Third. The place of birth of said applicant and if a naturalized citizen where and when naturalized.

Fourth. The name of owner of premises.

Fifth. That none of the applicants are in any manner pecuniarily interested in the profits of the busiess conducted at any other place in said county where any of said liquors are sold or kept for sale.

Sixth. That the applicant is the only person in any manner pecuniarily interested in the business so asked to be licensed and that no other person shall be in any manner pecuniarily interested therein during the continuace of the license.

Seventh. Whether applicant or any of them has had a license for the sale of liquors in this Commonwealth during any portion of the year preceding this application revoked.

Eighth. This petition must be verified by affidavit of applicant made before the clerk of the court a magistrate notary public or justice of the peace and if any false statement is made in any

part of said petition the applicant or applicants shall be deemed guilty of the crime of perjury and upon indictment and conviction shall be subject to its penalties.

Section 4. That section seven of said act which now reads as follows:

"Section 7. The said court of quarter sessions shall hear petitions from residents of the ward borough or township in addition to that of the applicant in favor of and remonstrance against the application for such license and in all cases shall refuse the same whenever in the opinion of the said court having due regard to the number and character of the petitioners for and against such application such license is not necessary for the accommodation of the public and entertainment of strangers or travelers or that the applicant or applicants is or are not fit persons to whom such license should be granted and upon sufficient cause being shown or proof being made to the said court that the party holding a license has violated any law of this Commonwealth relating to the sale of liquors the court of quarter sessions shall upon notice being given to the person so licensed revoke the said license" is hereby amended to read as follows:

Section 7. The said court of quarter sessions shall hear petitions from residents of the ward borough or township in addition to that of the ap-

plicant in favor of and remonstrance against the application for such license and in all cases shall refuse the same whenever in the opinion of the said court having due regard to the number and character of the petitioners for and against such application the applicant or applicants is or are not fit persons to whom such license should be granted or the place applied for is not a fit place and upon sufficient cause being shown or proof being made to the said court that the party holding a license has violated any law of this Commonwealth relating to the sale of liquors the court of quarter sessions shall upon notice being given to the person so licensed revoke the said license.

Section 5. That section eight of said act which as last amended by an act approved the twenty-sixth day of February Anno Domini one thousand nine hundred and nineteen entitled "An act to amend section eight of the act approved the thirteenth day of May one thousand eight hundred and eighty-seven (Pamphlet Laws one hundred eight) entitled 'An act to restrain and regulate the sale of vinous and spirituous malt or brewed liquors or any admixtures thereof, now reads as follows:

"Section 8. That all persons licensed to sell at retail any vinous spirituous malt or brewed liquors or any admixture thereof in any house room or place hotel inn or tavern shall be classified and required to pay annually for such privilege as fol-

lows: Persons licensed to sell by retail resident in cities of the first and second classes shall pay the sum of one thousand dollars and those resident in cities of the third class shall pay the sum of five hundred dollars those resident in all other cities shall pay three hundred dollars and those resident in boroughs shall pay the sum of one hundred and fifty dollars those resident in townships shall pay the sum of seventy-five dollars to the treasurer of the respective counties for the use of the counties in the following proportion: In cities the sum of one hundred dollars in boroughs and townships one-fifth of the amount of license shall be paid to the treasurer of the respective counties for the use of the counties and the balance shall be paid to the treasurer of the respective cities boroughs and townships for their respective use. Provided however That the money thus paid into any township treasury shall be applied to keeping the roads in good repair. Provided further That each person licensed to sell vinous spirituous malt or brewed liquors or any admixture thereof under the provisions of this act may pay the annual license fees herein provided for and any additional tax or license fee now established by law in twelve monthly instalments. The instalment for the first month shall be paid as now required by law before a license is issued to the applicant and each subsequent instalment at any time before the beginning of each succeeding month. Failure to make any of said monthly payments in advance shall terminate said license and all rights

therein and the licensee shall forthwith return the same to the court or authority by which it was issued" is hereby further amended to read as follows:

Section 8. That all persons licensed to sell at retail any vinous spirituous malt or brewed liquors or any admixture thereof in any house room or place hotel inn or tavern shall be classified and required to pay annually for such privilege as follows: Persons licensed to sell by retail resident in cities of the first and second classes shall pay the sum of five hundred dollars and those resident in cities of the third class shall pay the sum of two hundred and fifty dollars those resident in all other cities shall pay one hundred and fifty dollars and those resident in boroughs shall pay seventy-five dollars and those resident in townships shall pay the sum of forty dollars to the treasurer of the respective counties for the use of the counties in the following proportion: In cities boroughs and townships one-fifth of the amount of the license shall be paid to the treasurer of the respective counties for the use of the counties and the balance shall be paid to the treasurer of the respective cities boroughs and townships for their respective use. Provided however That the money thus paid into any township treasury shall be applied to keeping the roads in good repair.

Section 6. That section eleven of said act which now reads as follows:

"Section 11. The constable of the respective wards boroughs or townships in each county shall in the first week in each term of the court of quarter sessions make returns under oath of all places in his bailiwick where vinous spirituous malt or brewed liquors or any admixture thereof are kept for sale or sold except stores kept by druggists and apothecaries stating which of said places are licensed under this act and which are unlicensed and it shall be the special duty of the judge of said court to see that this return is faithfully made. And on failure of any constable to comply with this provision or if it be found upon examination or inquiry by said court that any constable has either wilfully or negligently omitted to return all such houses and the names of the proprietors thereof in his bailiwick he shall be guilty of wilfully or negligently making a false return and the court shall suspend him from office and direct the district attorney to indict and try said officer and if found guilty he shall be fined in a sum not exceeding five hundred dollars and undergo an imprisonment either simple or solitary not exceeding two years both or either in the discretion of the court" is hereby amended to read as follows:

Section 11. The constable of the respective wards boroughs or townships in each county shall in the first week in each term of the court of quarter sessions make returns under oath of all places in his bailiwick where vinous spirituous male or brewed liquors or any admixtures thereof *or any*

intoxicating liquors are kept for sale or sold except stores kept by druggists and apothecaries stating which of said places are licensed under this act and which are unlicensed and it shall be the special duty of the judge of said court to see that this return is faithfully made. And on failure of any constable to comply with this provision or if it be found upon examination or inquiry by said court that any constable has either wilfully or negligently omitted to return all such houses and the names of the proprietors thereof in his bailiwick he shall be guilty of wilfully or negligently making a false return and the court shall suspend him from office and direct the district attorney to indict and try said officer and if found guilty he shall be fined in a sum not exceeding five hundred dollars and undergo an imprisonment either simple or solitary not exceeding two years both or either in the discretion of the court.

Section 7. That section twelve of said act which now reads as follows:

"Section 12. It shall be the duty of each constable in the county to visit at least once in each month all places within their respective jurisdictions where any of said liquors are sold or kept to ascertain if any of the provisions of this or any act of assembly relating to the sale or furnishing of such liquors have been or are being violated and whenever any officers above mentioned shall learn of any such violation it shall be his duty to forth-

with make written returns of the same to the court of quarter sessions with the names of the witnesses and to do whatever shall be in his power to bring the offender to justice and upon any neglect or refusal of any of said officers to perform the aforesaid duty the said court shall impose the same penalties provided in section eleven of this act" is hereby amended to read as follows:

Section 12. It shall be the duty of each constable in the county to visit at least once in each month all places within their respective jurisdictions where any of said liquors are sold or kept to ascertain if any of the provisions of this or any act of Assembly relating to the sale or furnishing of such liquors *or intoxicating liquors* have been or are being violated and whenever any of the officers above mentioned shall learn of any such violation it shall be his duty to forthwith make written returns of the same to the court of quarter sessions with the names of the witnesses and to do whatever shall be in his power to bring the offender to justice and upon any neglect or refusal of any of said officers to perform the aforesaid duty the said court shall impose the same penalties provided in section eleven of this act.

Section 8. That section fifteen of said act which now reads as follows:

Section 15. Any person who shall hereafter be convicted of selling or offering for sale any vinous

spirituous malt or brewed liquors or any admixtures thereof without a license shall be sentenced to pay a fine of not less than five hundred dollars nor more than five thousand dollars and undergo an imprisonment in the county jail of not less than three months nor more than twelve months. Any person having license who shall hereafter be convicted of violating any of the provisions of the license laws shall be subject to a fine of not less than one hundred nor more than five hundred dollars and for any second offense whereof he shall be convicted of not less than three hundred nor more than one thousand dollars and for any third offense whereof he shall be convicted a fine of not less than five hundred nor more than five thousand dollars and undergo an imprisonment in the county jail not less than three months or more than twelve months or both or either at the discretion of the court. Any person convicted of more than one offense shall not again be licensed in any city or county of the Commonwealth and the license of any person permitting the customary visitation of disreputable persons or keeping a disorderly place may upon proof be at any time revoked by the court and when thus revoked the same party shall not again be licensed in any city or county of the Commonwealth" is hereby amended to read as follows:

Section 15. Any person who shall hereafter be convicted of selling or offering for sale any vinous spirituous malt or brewed liquors or any admix-

ture thereof without a license shall be sentenced to pay a fine of not more than *two thousand dollars* or undergo imprisonment in the county jail of not more than *six* months *or both*. Any person having license who shall hereafter be convicted of violating any of the provisions of the license laws shall be subject to a fine of not more than five hundred dollars or to an imprisonment in the county jail or not more than *three months or both*. Any person convicted of more than one offense shall not again be licensed in any city or county of the Commonwealth and the license of any person permitting the customary visitation of disreputable persons or keeping a disorderly place may upon proof be at any time revoked by the court and when thus revoked the same party shall not again be licensed in any city or county of the Commonwealth.

Section 9. That section seventeen of said act which now reads as follows:

"Section 17. That it shall not be lawful for any person with or without license to furnish by sale gift or otherwise to any person any spirituous vinous malt or brewed liquors on any day upon which elections are now or hereafter may be required to be held nor on Sunday nor at any time to a minor or a person of known intemperate habits or a person visibly affected by intoxicating drink either for his or her use or for the use of any other person or to sell or furnish liquors to any person on a pass-book or order on a store or to receive from any person any goods wares merchandise or pro-

visions in exchange for liquors shall be held and deemed a misdemeanor and upon conviction thereof the offender shall be fined not less than fifty nor more than five hundred dollars and undergo imprisonment of not less than twenty nor more than ninety days" is hereby amended to read as follows:

Section 17. That it shall not be lawful for any persons with or without license to furnish by sale gift or otherwise to any person any spirituous vinous malt or brewed liquors on Sunday nor at any time to a minor or a person of known intemperate habits or a person visibly affected by intoxicating drink either for his or her use or for the use of any other person or to sell or furnish liquors to any person on a passbook or order on a store or to receive from any person any goods wares merchandise or *other* provisions in exchange for liquors. *Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be sentenced to pay a fine of not more than five hundred dollars or to undergo imprisonment of not more than ninety days or both.*

Section 10. That section eighteen of said act which now reads as follows:

"Section 18. Any house room or place hotel inn or tavern where vinous spirituous malt or brewed liquors are sold offered for sale drank or given

away in violation of any law of this Commonwealth shall be held and declared a nuisance and shall be abated by proceedings at law or equity. All expenses connected with such proceedings including a counsel fee of twenty dollars for the counsel of complainant shall be paid by defendant or defendants'' is hereby amended to read as follows:

Section 18. Any house room or place hotel inn or tavern where vinous spirituous malt or brewed liquors *or intoxicating liquors* are sold offered for sale drank or given away in violation of any law of this Commonwealth shall be held and declared a nuisance and shall be abated by proceedings at law or equity. All expenses connected with such proceedings including a counsel fee of twenty dollars for the counsel of complainant shall be paid by defendant or defendants.

Section 11. That the said act is hereby further amended by adding thereto the following sections:

Section 20. That from and after the passage of this act any person who shall manufacture sell offer for sale furnish transport import export or possess any intoxicating liquor within the State for beverage purposes except as hereinafter provided shall be guilty of a misdemeanor and upon conviction thereof shall be sentenced to pay a fine of not less than one hundred dollars nor more than five thousand dollars or undergo an imprison-

ment of not more than three years or both at the discretion of the court.

Section 21. When proof of the manufacture sale offering for sale furnishing transporting possession exportation or importation of any intoxicating liquors has been given in evidence the jury may infer that the same was for beverage purposes but this inference shall not apply to medicines or anything unfit for beverage purposes or to extracts ordinarily used for culinary purposes. And this act shall not apply to such extracts when intended to be used for flavoring anything which when so flavored shall not violate the provisions of this act.

Section 22. It shall not be unlawful to possess intoxicating liquors in ones private dwelling provided such liquor is for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein which entertainment shall not be deemed an unlawful furnishing. The term "private dwelling" shall be construed not only in its ordinary sense but also to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house hotel or boarding house.

Section 23. Any premises for which a license is granted under this act shall be subject at all

times to inspection by authority of any judge of the court which has granted such license or of the district attorney of such county for the purpose of ascertaining whether any intoxicating liquor is kept upon said premises and any such liquor found thereon may be seized and used as evidence of the violation of this act.

Section 12. Nothing in this act shall affect any case in which it shall appear that the crime therein charged was committed prior to the date of the approval hereof but such offenders may be prosecuted and punished as if this act had not been passed.

Section 13. All licenses in force or granted at the time of the approval of this amendment shall remain in force until the expiration of the time for which they were granted unless revoked by the court for violation of the law and the instalments thereof shall be payable as heretofore provided by law until the said instalments have aggregated the amount of the license fee fixed by this amendment.

Approved: The 5th day of May, A. D. 1921.

C

ACTS OF ASSEMBLY OF PENNSYLVANIA RELATING TO THE SALE OF LIQUORS.

The initial point of modern legislation on the subject of license in Pennsylvania is the Act of March 11, 1834, P. L. 117.

Schlaudecker v. Marshall, 72 Pa. 200.

This act is entitled, "An Act relating to inns, taverns and retailers of vinous and brewed liquor."

The first section provides that the Courts of Quarter Sessions and Mayors' courts shall have power to grant licenses for taverns and inns.

Section 24 provided that no person shall keep a tavern without a license previously obtained, as aforesaid. He shall be liable to a penalty there prescribed.

Section 25 is:

> "If any person shall sell less than one quart of spirituous or vinous liquors to be delivered at one time to one or more persons without having first obtained a license agreeable to law for that purpose, such person shall be liable to indictment."

The next legislation is the Act of April 14, 1855,

P. L. 225, the title to this act being, "An Act to restrain the sale of intoxicating liquors."

Section 1 of this act is:

> "That from and after the first day of October next, it shall be unlawful to keep or maintain any house, room or place where vinous, spirituous, malt or brewed liquors, or any admixture thereof, are sold or drank, except as hereinafter provided; and all laws or parts of laws inconsistent with the provisions of this act be, and the same are hereby repealed."

Section 1 of the Brooks Law is:

> "That it shall be unlawful to keep or maintain any house, room or place, hotel, inn or tavern where any vinous, spirituous, malt or brewed liquor, or any admixture thereof, are sold by retail, except a license therefor shall have been previously obtained, as hereinafter provided."

The statute provides how licenses may be obtained to sell vinous, spirituous, malt or brewed liquors or admixtures thereof, and uses these terms throughout.

Section 4 makes it unlawful for any person to sell or keep for sale any vinous, spirituous, malt or brewed liquors or any admixture thereof without a license; and Section 11 makes it a misde-

meanor to sell any spirituous, vinous or malt liquor contrary to the act.

The next legislation is the Act of March 31, 1856, P. L. 200.

This act is entitled, "An Act to regulate the sale of intoxicating liquors."

Section 1 of this act is identical with Section 1 of the Act of 1855, except the date. This statute provides how licenses may be obtained.

The Act of April 20, 1858, is entitled, "A Supplement to an Act to regulate the sale of intoxicating liquors," approved the 31st day of March, A. D. 1856.

This act refers to applicants for licenses to vend any intoxicating liquors by the quart or greater quantities, and fixes the license fees to be paid by them and also the rate of licenses for hotels, inns and taverns.

The Act of April 14, 1859, P. L. 653, is entitled, "An Act relating to the granting of licenses to hotel, inn or tavern keepers." It authorizes the Court of Quarter Sessions to hear petitions for and remonstrances against the application for licenses and to refuse the same whenever such inn, hotel or tavern is not necessary for the accommodation of the public. It repeals so much of the sixth section of the Act of Assembly relating to the sale of intoxicating liquors, approved April 20, 1858, as was inconsistent therewith.

The Act of March 22, 1867, P. L. 40, is entitled, "A further Supplement to an Act to regulate the

granting of licenses to hotels and eating houses, approved March 31, 1856."

It provides that when an application is made for licenses to sell intoxicating drinks it shall be lawful for the court to hear petitions for and remonstrances against the application for such licenses and in all cases to refuse the same whenever, in the opinion of the court, such license is not necessary for the accommodation of the public and entertainment of strangers and travelers.

Section 4 provides:

> "If any person, after the passage of this Act, shall sell spirituous and vinous liquors, domestic wines, malt or brewed liquors without having obtained a license authorizing him so to do, such person shall, on conviction in the Court of Quarter Sessions be fined," etc.

The next legislation, the Act of March 27, 1872, P. L. 49, is entitled, "An Act to permit the voters of this Commonwealth to vote every three years on the question of granting licenses to sell intoxicating liquors."

The first section provides for the holding of elections, for the purposes indicated by the title.

Section 3 provides:

> "Whenever, by the returns of elections in any city or county aforesaid, it shall appear that there is a majority against licenses, it shall not be lawful for any court or board of licensed commissioners to issue any license

for the sale of spirituous, vinous, malt or any other intoxicating liquors, or any admixture thereof in said city or county."

This was a local-option law, and was in effect but a short time.

The Act of March 28, 1878, P. L. 9, is entitled, "An Act relative to the employment of females in hotels, taverns, saloons and eating houses, or other places for the sale of intoxicating and other drinks, and the penalty for the violation thereof."

The act prohibits the employment of any female at any hotel, tavern, saloon or eating house to sell, vend, offer, procure, furnish or distribute, any intoxicating drinks, or any admixture thereof.

The act further provides:

"Nor shall it be lawful for any female not having a license as permitted by the laws of this Commonwealth for the sale of intoxicating liquor, to sell at any hotel, tavern, etc., any intoxicating drinks, or any admixture thereof, ale, beer, wine or cider, to any person or persons."

The Act of June 9, 1891, P. L. 257, is entitled, "An Act to restrain and regulate the sale of vinous and spirituous, malt or brewed liquors, or any admixture thereof, by wholesale."

The enacting clause is:

"That all wholesale dealers, brewers, distillers, rectifiers, compounders, store-keepers

> and agents, having stores or offices within this Commonwealth dealing in intoxicating liquors, either spirituous, vinous, malt or brewed, shall pay for each separate store, brewery, distillery * * * an annual license."

The act requires the license to be applied for in substantially the same form as required by the Act of 1887 for a retail license, except that in the case of breweries and distilleries it is not necessary that the place to be licensed is necessary for the accommodation of the public.

The Act of June 19, 1901, P. L. 572, is entitled: "An Act authorizing the several Courts of Quarter Sessions of this Commonwealth to grant licenses to sell intoxicating liquors at retail, wholesale, or by brewers, for a longer or shorter period than one year in certain cases, but only for the purpose of changing the date from which annual license shall thereafter run and take effect."

The statute provides:

> "That whenever any of the several Courts of Quarter Sessions of this Commonwealth shall deem it expedient and desirable to change the date as fixed by rule or standing order, from which license to sell intoxicating liquors, either at retail, wholesale, or by brewers shall run, it shall be lawful for any of said courts, in order to make such change, to grant such license for a longer or shorter period than one year."

This is really a supplement to or an amendment of Section 3 of the Brooks Law, and is pari materia therewith.

The Act of July 30, 1897, P. L. 464, is entitled, "An Act to provide revenue and regulate the sale of malt, brewed, vinous or spirituous liquors, or any admixtures thereof, by requiring and authorizing licenses to be taken out by brewers, distillers, wholesalers, bottlers, rectifiers, compounders, storekeepers and agents having a store, office or place of business within this Commonwealth, prescribing the amount of license fees to be paid in such cases, and by imposing an additional license fee on retail dealers in intoxicating liquors."

Section 1 of the act provides:

> "That all wholesale dealers, brewers, distillers, rectifiers, compounders, bottlers, storekeepers and agents having stores or offices within this Commonwealth dealing in intoxicating liquors, either spirituous, vinous, malt or brewed, shall pay for the use of the Commonwealth" certain fees therein fixed.

Section 2 provides:

> "On and after the passage of this act, every person or persons licensed by the proper court to sell vinous, spirituous, malt and brewed liquors, or any admixture thereof by retail" shall pay certain fees thereby fixed.

Joint Resolution proposing amendment to Constitution, P. L. 1887, page 414:

"No. 1.

JOINT RESOLUTION.

Proposing an Amendment to the Constitution of this Commonwealth.

"Section 1. Be it resolved, etc., That the following amendment is proposed to the Constitution of the Commonwealth of Pennsylvania, in accordance with the eighteenth article thereof:

AMENDMENT.

"There shall be an additional article to said Constitution, to be designated as Article XIX, as follows:

ARTICLE XIX.

"The manufacture, sale, or keeping for sale, of intoxicating liquor, to be used as a beverage, is hereby prohibited, and any violation of this prohibition shall be a misdemeanor, punishable as shall be provided by law.

"The manufacture, sale, or keeping for sale, of intoxicating liquor, for other purposes than as a beverage, may be allowed in such manner only as may be prescribed by law. The General Assembly shall, at the first session succeeding the adoption of this article of the

Constitution, enact laws, with adequate penalties, for its enforcement."

Approved: The 10th day of February, A. D. 1887.

D.

Raudenbusch's Petition, 120 Pa. 328. Opinion of Supreme Court, Mr. Justice Paxson (338):

"The petition in this case sets forth that the petitioner resides at No. 18 North Twelfth Street, in the Ninth Ward of the city of Philadelphia, and has for the last five years carried on the business of selling liquor at retail, at the said house, having been licensed to carry on said business in conformity with the laws of this Commonwealth heretofore existing; that being desirous of continuing said business, he presented his petition to the Court of Quarter Sessions, in conformity with the terms of the act of assembly of May 13, 1887, praying for a license to sell at retail vinous, spirituous, malt or brewed liquors for the period of one year from June 1, 1888; that he has complied strictly and in every respect with said act, and that he possesses all the qualifications required thereby; that 'No evidence, petition, remonstrance or statement of counsel, or of any other person whatever, being made or offered, or any objection of any kind being made against him or his application, he was permitted to depart and was dismissed from any further hearing;' that on the second day of April, 1888, it was announced by the

said judges of the said court that the said application or petition of the petitioner had been refused.

"The petitioner prays this court 'That the said judges of the said Court of Quarter Sessions who heard his said application and petition, and who refused to grant the same, may be commanded, first, by an alternative mandamus, to show cause why the prayer of said petition or application should not be granted, and secondly, by a peremptory mandamus to do fully all that is required to be done by the said act, and justice.'

The seventh section of the act of May 13, 1887, under which it is claimed it is the duty of the Court of Quarter Sessions to grant this license, is as follows:

'The said Court of Quarter Sessions shall hear petitions from residents of the ward, borough, or township, in addition to that of the applicant, in favor of and remonstrances against the application for such license, and in all cases shall refuse the same whenever in the opinion of the said court, having due regard to the number and character of the petitioners for and against such application, such license is not necessary for the accommodation of the public and entertainment of strangers or travelers, or that the applicant or applicants is or are not fit persons to whom such license should be granted; and, upon sufficient cause being shown, or proof being made to the said court, that the party holding a license has violated any law of this com-

monwealth relating to the sale of liquors, the Court of Quarter Sessions shall, upon notice being given to the persons so licensed revoke the said license.'

It will be noticed that the petition does not aver that the judges of the Court of Quarter Sessions have neglected or refused to act upon his petition. His grievance is, that they *have* acted and have refused him a license. He now asks that they shall be compelled to show cause why his license should not be granted, and by a peremptory mandamus 'to do fully all that is required to be done by the said act, and justice.' We understand the prayer for relief to mean that if the judges cannot show that the petitioner has not complied with the act of 1887, or that a remonstrance has been filed, or an objection made by one or more citizens to the granting of a license to the petitioner, it is the duty of this court to issue a peremptory mandamus to the judges of the Quarter Sessions to compel them to grant such license. The petitioner assumes that he is entitled as a matter of right to a license, upon complying with the provisions of the act of 1887, in the absence of any allegation that he is an improper person to be so licensed. This is the fallacy which underlies his case, as well as the able argument of his learned counsel. He has no such absolute right, nor has any other man in the Commonwealth.

It is not needed to review the license legislation of this state for the last half century. That was thoroughly done by Mr. Justice

Agnew in *Schlaudecker v. Marshall,* 72 Pa. 200. It is sufficient to say that prior to the act of 1887, the law was by no means uniform, there being many local acts in existence differing essentially from each other. In Philadelphia, any citizen could procure a license, upon payment of the license fee to the county treasurer. In some counties licenses were granted by the Court of Quarter Sessions, where in the opinion of the court the public accommodation required them. The whole history of our license system and the legislation attending it shows that the unrestricted sale of liquor has for a long time been regarded as a great evil. It is one which statesmen, and many earnest men and women, have been wrestling with from the organization of the government. When therefore the legislature came to enact the act of 1887, they were seeking to curb and regulate this evil. This clearly appears from the title of the act. It reads, 'An act to *restrain* and regulate the sale of vinous and spirituous, malt or brewed liquors, or any admixture thereof.' The mode of restraint adopted by the legislature was twofold. One was, to increase the price of the license, by which many saloons would be closed and others rendered more respectable; the other was, to substitute the discretion of the Court of Quarter Sessions for the mere ministerial duty of granting licenses by county treasurers, as it had theretofore existed in Philadelphia and some other places. If the construction of the act contended for by the petitioner be the correct one, then the title of the act should read, 'An act to *increase*

the sale of liquor and to derive revenue therefrom.' In other words, it would give every man in the state the right to sell liquor, who could pay for his license and comply with the act. This would do violence to its letter and spirit.

The petitioner begs the whole case, when he assumes that he has a right to a license because he is a respectable man, has always kept a respectable house, and that no remonstrances have been filed against him. It is an error to suppose that the sole duty of the court is confined to the inquiry whether the applicant is a citizen of the United States and a man of good moral character, etc. Back of all this lies the question whether the petitioner's house is 'necessary for the accommodation of the public and entertainment of strangers and travelers,' and the plain duty of the Court of Quarter Sessions, under the act of assembly, is to exercise its discretion as to 'restrain' rather than increase the sale of liquor. We do not know how many public houses there are in the Ninth Ward; it is not material that we should. We are bound to presume that the judges below have ascertained the number in a judicial manner; that they have in like manner decided how many are necessary for the public accommodation. An investigation of this question has no particular bearing upon the petitioner's fitness to keep a saloon; it is a general one, with which he has no more legal concern than any other citizen of the ward. The question is one of public concern; the petitioner is no party to it in the sense that persons are par-

ties to private litigation. It may thus happen that licenses are refused to persons against whom there is no possible objection on personal grounds. Thus, if a ward has one hundred public houses where only fifty are required by the public wants, it is plain that fifty houses must be denied license although every one of the applicants is a worthy man and keeps a respectable house, and though there be neither remonstrance nor objection on the score of fitness. The denial of a license under such circumstances may seem arbitrary. The trouble is, there are more persons who want to sell liquor than the legislature consider it for the public good to license for that purpose.

I will not consume time with an extended discussion of the right of the judges of the Court of Quarter Sessions to exercise their discretion in the granting of license. It has been exercised by that court almost time out of mind, and the power has again and again been affirmed by this court. This discretion, however, is a legal discretion, to be exercised wisely and not arbitrarily. A judge who refuses all applications for license, unless for cause shown, errs as widely as the judge who grants all applications. In either case it is not the exercise of judicial discretion, but of arbitrary power. The law of the land has decided that licenses shall be granted to some extent, and has imposed the duty upon the court of ascertaining the instance in which the license shall be granted. In order to perform this duty properly, the act of assembly has provided means by which the conscience

of the court may be informed as to the facts; it may hear petitions, remonstrances, or witnesses, and we have no doubt the court may in some instances act of its own knowledge. The mere appearance of an applicant for license, when he comes to the bar of the court, may be sufficient to satisfy the court that he is not a fit person to keep a public house. The judge is not bound to grant a license to a man whom he knows to be a drunkard or a thief, or has actual knowledge that his house is not necessary for the public accommodation. The object of evidence in such cases is to inform the conscience of the court, so that it can act intelligently and justly in the performance of a public duty. While the act of deciding in such cases is perhaps quasi-judicial, the difference between the granting or withholding of a license, and the decision of a question between parties to a private litigation, is manifest. Neither the petitioner nor any other person in this state has any property in the right to sell liquor.

It is needless to cite the numerous cases in which this court has refused to interfere with the discretion of the Quarter Sessions in regard to licenses. I will refer to *Schlaudecker v. Marshall, supra,* which is upon all-fours with this, and where the question was raised upon an application for a mandamus to a board of licensers appointed under the act of May 10, 1871, giving to the said board 'the same power and authority to grant licenses in the city of Erie as the Court of Quarter Sessions by law now has.' The act then in force was that of March 22, 1867, the

first section of which was substantially the same as the seventh section of the act of 1887, so far as the duties of the court are concerned. The petitioner there, as here, averred all that was necessary under the law to entitle him to a license, nor does any remonstrance appear to have been filed against it. The petitioner obtained a rule upon the board, to show cause why they should not grant his application. An answer was put in by the board in which, after specifying the number of applications, the number granted, and the number refused, they said:

"The respondents answer and say that they claim it is not only simply their privilege, but an important duty enjoined upon them by law, fully and carefully to examine every application for a license, and when they are bound to be in form according to the provisions of the act of assembly, that would constitute a prima facie case. Then it becomes the duty of the board, particularly when there are one hundred and thirty-four applications for license to deal out spirituous liquors in a city of a population to about twenty thousand, first, to see if the public interest required that number to be licensed; and, second, is the applicant a person of good repute for honesty and temperance? and, third, has he the necessary house room? These facts the board has to ascertain from evidence or personal inspection, and thereupon to judge and determine upon all the cases submitted to the board. These respondents claim that

it is their duty, in discharge of an obligation they owe to the public, not to take the certificate of the twelve citizens as conclusive as to the necessity of the tavern or eating house for the public accommodation, as to the honesty and temperance of the applicant, and as to his being provided with house room, but to examine into the matter, and upon a full and careful investigation to decide who shall have license and who shall not. These respondents did decree upon Mr. Schlaudecker's application and rejected it, and believe they acted in accordance with the law in doing so."

This court, in an elaborate opinion by Mr, Justice Agnew, decided that, upon this state of facts, the writ of mandamus was properly refused. See, also *Toole's Appeal,* 90 Pa. 376, as to the discretion of the court.

Were we to grant the alternative mandamus now prayed for, it would result only in a return thereto by the judges of the court below that they have considered the application of the petitioner, and in the exercise of the judicial discretion conferred upon them by law, have rejected it. Under all our cases such a return would be conclusive, and it would lead to no profitable result to allow the writ."

It is therefore denied."

E.

Schlaudecker v. Marshall, 72 Pa. 200. Opinion of the Supreme Court. Agnew, J. (203):

"In the court below this case was a rule for a mandamus to compel the board of licensers of the city of Erie to grant a license to the plaintiff in error to keep an eating-house. The rule was discharged, and hence this writ of error. The real question in the case is upon the nature and extent of the discretion to be exercised by the board of licensers in granting or refusing licenses for eating-houses. It arises under the Act of 10th, May, 1871, P. L. 728, giving to the board 'the same power and authority to grant licenses in the said city of Erie as the Court of Quarter Sessions by law now has.' The requirements of the application for the license are governed by the 8th section of the Act of 31st March, 1856, P. L. 201. See Section 2d, Act 10th, 1871. But the power and authority of the board in acting on the application are to be ascertained by the state of the law as to the Court of Quarter Sessions, at the date of the Act of 1871. This involves an attentive examination of the legislation of the state for a series of years, a subject of no small difficulty, owing to the fluctuations in the legislature as the temperance or liquor interests prevailed.

The initial point of modern legislation on the subject of licenses may very properly be said to be the Act of 11th March, 1834, P. L. 117, reported by the revisers of the code as the result of all the then existing laws, together with their own modifications and amendments. The discretion conferred upon the Court of Quarter Sessions by this act will be stated hereafter, when we come to the reviving Act of 14th April, 1859, P. L. 653. For

twenty-one years the Act of 1834 remained without material change. In 1855, the temperance reform movement prevailing in the legislature, the Act of 14th April, 1855, entitled 'An Act to restrain the sale of intoxicating liquors,' was passed, P. L. 255. This act was nearly prohibitory in its terms, and in derision was called the 'Jug Law.' It lasted but a year and was overthrown by the Act of 31st March, 1856, P. L. 200, entitled 'An Act to regulate the sale of intoxicating liquors,' an act passed through the influence of what was then known as the 'Liquor League.' The Act of 1856 was considerably modified by the Act of 20th April, 1858, P. L. 365, and the two, with a few alterations since adopted, form the basis of the present system of licenses for the sale of intoxicating liquors.

Under the Act of 1856 the discretion of the court in granting licenses differed somewhat, but not greatly, from that given by the Act of 1834, and was regulated by the sixth section, which required the court to fix by rule or standing order a time at which applications for license should be heard, and when all persons applying or making objections might be heard by evidence, petition, remonstrance or counsel. This provision was essentially changed by the sixth section of the Act of 1858, which made the granting of the license mandatory 'to citizens of the United States of temperate habits and good moral character, whenever the requirements of the laws on the subject are complied with by any such applicant, to sell the liquor aforesaid for one entire year from the date of his license: Provided,

That nothing herein contained shall prohibit the court from hearing other evidence than that presented by the applicant for license: And provided further, That after hearing the evidence as aforesaid, the court, board of licensers or commissioners shall grant or refuse a license to such applicant in accordance with the evidence.

This act took away the discretion which the courts had exercised under the Acts of 1834 and 1856, and made it a matter of legal judgment on the evidence. The temperance movement rallying again effectuated the passage of the Act of 14th April, 1859, P. L. 653, in these words: 'That it shall be lawful for the several Courts of Quarter Sessions of this Commonwealth to hear petitions, in addition to that of the applicant, in favor of and remonstrance against the application of any person applying to either of them for a license to keep a hotel, inn or tavern, and thereupon to refuse the same, whenever, in the opinion of said court, such inn, hotel or tavern is not necessary for the accommodation of the public and entertainment of strangers and travelers. And so much of the sixth section of the Act of Assembly relating to the sale of intoxicating liquors, passed the 20th day of April, A. D. 1858, as is inconsistent herewith, is hereby repealed: Provided, That the several Courts of Quarter Sections empowered to grant licenses shall have and exercise such discretion, and no other, in regard to the necessity of inns and taverns, as is given to said courts by the act relative to inns, approved 11th March, 1834.' Thus the discretion of the

courts upon the necessity of inns and taverns was turned back upon the Act of 1834, the first section of which merely empowered the court to grant such licenses. The third section provided that 'no court shall license any inn or tavern which shall not be necessary to accommodate the public and entertain strangers and travellers.' The fifth section further enacted that 'no court shall license any person to keep an inn or tavern unless from the petitions and certificate or from their own knowledge or upon evidence sought for and obtained, they shall be satisfied of the fitness of the person applying and the sufficiency of the accommodations as aforesaid.' The Fourth section had provided that no court shall grant a license unless upon a certificate of twelve citizens, setting forth the necessity of the inn or tavern to accommodate the public and entertain strangers and travellers, and the good reputation of the applicant for honesty and temperance, and his being well provided with house-room and convenience for the accommodation of strangers and travellers. The bearing of the Act of 1834 upon the discretion of the court is noticeable in the negative character of its provisions to prevent granting unnecessary licenses. The nature of this discretion will be discussed after noticing the legislation on the subject of eating-houses or restaurants as they are termed. They were provided for in the Act of 10th April, 1849, P. L. 570, the 20th section of which forbade them from being kept without a license first obtained from the county treasurer, and provided for classifying and rating them. By the

Act of 1856, the mode of granting licenses to eating-houses was changed and given to the Court or Quarter Sessions, as may be seen in the 6th, 7th, 8th and 14th sections. The Act of 1858 again changed the manner of granting them, dispensing with the certificate required by the 8th Section of the act of 1856, and returning the power of granting the license to the county treasurer. See sec. 10, Act 1858, P. L. 367. Under this section the treasurer exercised no discretion, except to see that the applicant had complied with the requisites of the law. This was changed afterwards, as to the counties of Erie, Warren and Clinton, by the Act of 11th April, 1866, P. L. 560, which adopted the provision for the borough of Warren, contained in the Act of 22nd April, 1863, P. L. 534, enacting 'that all licenses for the keeping of eating-houses, which shall authorize the sale of domestic wines and malt and brewed liquors within the borough of Warren, Warren county, shall hereafter be granted only by the Court of Quarter Sessions of said county, in the same manner and subject to the same restrictions as licenses to hotels, inns and taverns are now granted, except that said eating-houses shall be classified and rated as provided by existing laws.' This local act was superseded by the general Act of 22nd March, 1867, P. L. 40. The first section put the hearing of all applications for licenses to sell intoxicating drinks on the same footing, directing that it should be lawful for said court to hear petitions in addition to that of the applicant, in favor of and remonstrance against the application for such licenses; and

in all cases to refuse the same, whenever, in the opinion of the said court, having due regard to the number and character of the petitioners for and against such application, such license is not necessary for the accommodation of the public and entertainment of strangers and travellers; and upon sufficient cause shown to revoke any license granted by them. The second section expressly directs that applications for license to keep an eating-house or restaurant shall be made in the same manner and to the same authority as applications for license to keep a hotel, excepting that the regulation as to bed-rooms shall not apply; and also repeals expressly the authority in the 10th section of the Act of 1858, conferred on the county treasurer to grant licenses to eating houses and retail breweries. In conclusion, therefore, we find that the granting of licenses to hotels, inns, eating-houses and restaurants, all stand on the same footing as to the authority to which the power is confided, and it now remains only to inquire into the nature and true character of the discretion to be exercised by the Court of Quarter Sessions in granting these licenses.

No subject has been productive of more difference of opinion and practice than this in the different judicial districts of the state. Some judges holding it to be obligatory on the court to grant every license where the applicant has brought himself within the provisions of the law as to the terms of his application, and others holding that they are not bound to grant any license whatsoever. Clearly neither opinion is right; the discretion

which the court exercises being a sound discretion upon the circumstances of each case as it is presented to the court, and not a general opinion upon the propriety or impropriety of granting licenses.

Whether any or all licenses should be granted is a legislative, not a judicial question. Courts sit to administer the law fairly, as it is given to them, and not to make or repeal it. The law of the land has determined that licenses shall exist, and has imposed upon the court the duty of ascertaining the proper instances in which the license shall be granted, and therefore has given it to the court to decide upon each case as it arises in due course of law. The act of deciding is judicial, and not arbitrary or wilful. The discretion vested in the court is, therefore, a sound judicial discretion; and to be a rightful judgment it must be exercised in the particular case and upon the facts and circumstances before the court, after they have been heard and duly considered; in other words, to be exercised upon the merits of each case, according to the rule given by the Act of Assembly. To say that I will grant no license to any one or that I will grant it to every one is not to decide judicially on the merits of the case, but to determine beforehand without a hearing or else to disregard what has been heard. It is to be determined not according to law, but outside of law, and it is not a legal judgment, but the exercise of an arbitrary will. Discretion is thus described: 'Where anything is left to any person to be done according to his discretion the law intends it must be done with a sound dis-

cretion and according to law, and the Court of King's Bench hath a power to redress things that are otherwise done, notwithstanding they are left to the discretion of those that do them,' Tomlin's Law Dict., Vol. 1, tit. 'Discretion.' 'And though there be a latitude of discretion given to one, yet he is circumscribed that what he does be necessary and convenient, without which no liberty can defend it': Ibid. It is the duty of the court, therefore, to hear and determine each case on its evidence and facts; to ascertain the fitness of the applicant, the necessity of his house for the public accommodation as a hotel or as an eating-house (and this involves the number of each in the particular locality), and to see that the applicant has fully complied with the law, before his license can be granted. This is a large discretion, and is to be exercised primarily for the public good and secondarily for the private interest; and this being the power and authority of the Court of Quarter Sessions, is the measure also of the duty of the board of licensers. It is an error to suppose, as argued by the plaintiff in error, that the sole duty of the board is confined to the inquiry whether the applicant is a citizen of the United States, and is a man of good moral character and temporate habits. The mandamus was properly refused, and the order of the court below affirmed."

F.

Venango County Liquor Licenses, 58 Superior Court 277. Part of the opinion of Superior Court, Rice P. J. (295):

"Their counsel state the question as follows: 'Does a license judge abuse his judicial discretion where he refuses all applications on the sole ground of non-necessity, based and considered exclusively upon the conclusion that there is a growing sentiment against the liquor traffic generally and that the granting of liquor licenses in point of public economics, morals, law and order is detrimental to the communities affected?' If we could agree with the learned counsel that this is the question presented by the records or by the opinion, we should unhesitatingly agree with them that there was a misconception by that court of the nature and extent of its discretionary power and of the legal principles governing its exercise, and that the enforcement of that erroneous view, by its action, was not the exercise of a sound judicial discretion, but would be justly characterized, in the language of Agnew, J., in *Schlaudecker v. Marshall*, 72 Pa. 200, as a determination not according to law but outside of law and therefore not a legal judgment but the exercise of an arbitrary will. 'A decree made arbitrarily, or in violation of law, it is our plain duty to set aside. For example, if a judge should refuse a license, because in his opinion the law authorizing licenses is a bad law, or if he should grant all licenses because he believed the law wrong as tending to confer a privilege on a special few, in either case there would be no exercise of judicial discretion: both would be the mere despotic assertion of arbitrary will by one in power, that sort of lawlessness which is least excusable and excites most in-

dignation'; *Gross' License,* 161 Pa. 344. But, as already shown, the question as stated by counsel does not arise upon the records proper. Does it arise upon the opinion? In other words, is it fairly inferable, from the opinion, that the court determined that the licenses were not necessary exclusively upon the grounds that there is a growing sentiment against the liquor traffic generally and that the granting of liquor licenses is detrimental to the communities affected?

Near the end of the opinion appears this clause: 'The law has not recently been changed but new facts and a changed aspect of old ones with a changed trend of sentiment and thought on the subject, bearing upon the important question of necessity for the licenses, have been presented and for the first time in the history of the county the court has been called upon to broadly consider and pass upon such question as it relates to all retail and wholesale applications.' Even standing alone, this expression does not fairly warrant the conclusion that the court was moved to make the decisions it did by the growing sentiment against the liquor traffic generally; and any possible inference that it did so is wholly repelled by the next clause, which reads: 'A consideration of such question in the light of the law as hereinbefore expressed, with due regard to the number and character of the petitioners for and remonstances against such applications, the evidence and arguments of counsel presented on full hearing and the facts which are known to the court and common knowledge in the

communities affected has led to the conclusion that in the exercise of the discretion vested in it by law the court should refuse all such applications and orders will accordingly be indorsed upon them, respectively, to this effect.' It is but a mere truism to say that courts must be guided by the will of the people, when this will has been expressed in the laws which the judges have sworn to administer. We cannot safely infer from this opinion that the court conceived that public sentiment and not the law was to control it in the exercise of the discretion vested in it. With regard to what the court said, in another part of the opinion, as to the weight to be attached to the petitions and remonstances, there certainly can be no criticism. See *Indian Brewing Company's License*, 226 Pa. 56.

The opinion does indeed show that the court deemed it its duty to consider, and did consider, those incidents inseparably connected with the exercise of the privilege conferred by the grant of license which affect the public welfare. But it does not show that the court entertained and acted upon the erroneous view that a license to conduct a business having such incidents never can be necessary in a legal sense. On the contrary, the clear import of the opinion is, that, in determining the question of necessity for the particular license sought for, the court should consider these inseparable incidents of the business as well as the demands of persons to whom a licensed dealer may lawfully sell liquor. To fail to do so, said the court, and to regard as

proper for consideration only its useful or unobjectionable functions is to do violence not only to the adjudged law of the state but to the common sense and instincts of men. This general view is not erroneous. It does not involve the proposition that the word 'necessary' in the statute is synonymous with 'indispensable,' or the equally indefensible proposition that the public accommodation which the law is intended to promote is to be ignored or treated as of little importance as compared with the objectionable features of the business; but only that both are to be given fair and impartial judicial consideration in connection with the other pertinent facts. Necessarily, it seems to us, the difference in the nature of the business from that of many other commercial enterprises enters into the question. For example, in the administration of a law providing for the licensing of the sale of many staple commodities, it might well be considered that, if there be such demand for the commondities by consumers as would make the sale of them profitable to the licensee, the legal necessity for the license would be established. But it has never been authoritatively decided that this is the sole and conclusive test to be applied in determining whether a license to sell liquor as a beverage is necessary in a particular community, or how many licenses are necessary in a particular community. Such construction of the law would be in contravention of one of its express purposes, which is to restrain, and would lead to results which no one will contend would be for the public

good or were so regarded by the legislature. It would, moreover, be opposed to the general rule enunciated in *Schlaudecker v. Marshall*, and approved in all later decisions, that the large discretion vested in the quarter sessions 'is to be exercised primarily for the public good, and secondarily for the private interest.' The opinion of the quarter sessions speaks for itself and we will not discuss it further. Suffice it to say, that, in our judgment, it does not, taken as a whole, warrant the inference as to the grounds of the court's decision of the question of necessity which the appellants ask us to draw; it does not overthrow the prima facie presumption arising from the records, that the court heard and decided according to law.

Third. One other feature of the case is to be noticed. Attention is called by appellants' counsel to the population of the county and of the two cities and the borough from which these applications came. These are facts of which this court may take judicial notice. It is argued, in effect, that the refusal of all licenses in these populous communities is itself evidence that the court proceeded upon an erroneous theory as to its discretionary power or as to what constitutes legal necessity for a license. Particular stress is laid upon the declaration in the opinion of *Schlaudecker v. Marshall*: 'The law of the land has determined that licenses shall exist.' But when this expression is read with the context, it is evident, we think, that what the court meant is, that the policy of the commonwealth, as embodied in and exhibited by

its laws, is that the sale of intoxicating liquors as a beverage shall be regulated by license, not prohibited, and that the court is to exercise its discretion in obedience to the settled policy of the commonwealth as thus expressed, and not according to his individual opinion upon the propriety or impropriety of granting licenses. To construe the expression to mean that the law makes it imperative that some licenses shall be granted in every county of the commonwealth, would be as unwarranted as to construe it to mean that some licenses, if applied for, shall be granted in every municipal subdivision of the county. The statute contains no such mandate. Its command is that the court shall give due hearing upon each application, 'and in all cases shall refuse the same whenever, in the opinion of the said court having due regard to the nature and character of the petitioners for and against such application, such license is not necessary for the accommodation of the public,' etc. If the due hearing and consideration of each application and all the pertinent facts, in accordance with the express mandate and plain intent of the judicial discretion, lead the court to the conclusion that that license is not necessary, we fail to see how the fact that the same result was reached in some or all the other applications can be regarded by the appellate court as a sufficient reason for impeaching the conclusion. Hence, while the argument from the fact that all the applications in this county were refused is pertinent and has much force, it does not compel the conclusion that the result could only have

been reached by an abuse of the court's discretion.

As there was a judicial hearing at which each petitioner had an opportunity to be heard by petition, evidence, and counsel, and as it appears that the reason assigned by the court for the refusal of the license was a legal reason, and as it does not satisfactorily appear that the court's conclusion was reached by a consideration of matters which it had no right to consider, or by a refusal to consider matters which it was its duty to consider, we are not at liberty to conclude that there was an abuse of discretion: *Nolan's License*, 47 Pa. Superior Ct. 551. It is not our province to discuss or determine the correctness of the result reached. As has been declared repeatedly, it is the discretion of the court of Quarter Sessions, not ours, that the law requires.

The several orders are affirmed."

G.

Commonwealth v. Spence, 230 Pa. 571. Opinion of Supreme Court. Brown, Justice:

"The appellant applied to the court of quarter sessions of Chester county for a license to sell liquors. His petition was for a license 'to sell vinous, malt and brewed liquors by retail,' and it was granted as prayed for. During the year for which it was issued he sold spirituous liquors, and, having been indicted for selling without a license in

violation of the Act of May 13, 1887, P. L, 108, was convicted and sentenced to pay a fine and undergo imprisonment. On appeal to the Superior Court, his conviction was sustained: *Com. v. Spence,* 43 Pa. Superior Ct. 7.

At the time the appellant sold spirituous liquors he held in his hands a license to sell liquors, granted to him by the same court of Quarter Sessions that directed the jury to convict him of selling without a license. 'But,' says that court, speaking of itself in its opinion sustaining the verdict against him, 'it certainly did not grant, and was not understood by the defendant to have granted, the Brooks license authorizing the sale of spirituous liquors.' It did, however, direct a license to issue to him to sell intoxicating liquors, and such license was issued to him by its clerk in pursuance of its decree, after he had paid to the commonwealth the fee fixed by the Brooks act for the privilege of selling vinous, spirituous, malt and brewed liquors. The authority of a court of quarter sessions to grant a liquor license rests solely upon legislative enactment, and, in the absence of statutory authority to grant it, no court can direct it to issue. The only act of assembly in existence authorizing the granting of a license at the time the court below granted one to the appellant was that of May 13, 1887, popularly known as the Brooks law. This is made too plain for discussion by the first section of the act, which provides 'that it shall be unlawful to keep or maintain any house, room or place, hotel, inn or tavern, where any vinous, spirituous, malt or brewed liquors, or

any admixture thereof, are sold by retail, except a license therefor shall have been previously obtained as hereinafter provided.' These last three words make it unlawful to conduct any retail liquor establishment unless a license is first obtained under the act of 1887, thereby excluding and virtually repealing all prior methods of granting licenses. The eighth section provides that all persons licensed to sell at retail any vinous, spirituous, malt or brewed liquors, or any admixture thereof, in any house, room or place, hotel, inn or tavern, shall be classified for the purpose of fixing the license fee to be paid by a retailer, whose privilege, no matter in which class he may be, is to sell spirituous as well as vinous, malt and brewed liquors. This change in the law was at once generally recognized by the judges of the courts of quarter sessions throughout the state, and, so far as we are informed, the attempt to grant licenses other than as authorized by the act of 1887 has long since ceased, except in one or two counties. The county of Chester is one of these, and the judges of its court of quarter sessions seem to recognize the absence of any power under the present statute to grant eating house licenses, but make excuse for granting them that they but followed a custom established by a former member of the court. But where did he get any authority to grant such a license? It was not his province, but a purely legislative function, to determine what kind of a license may be issued for the sale of liquors.

In view of the unambiguous declaration of

the legislature that a license to sell intoxicating liquors must be obtained in accordance with the provisions of the act of 1887, we are constrained to say that we are utterly at a loss to understand how the learned trial judge below could have held that the license issued to the appellant had not been issued under that act. And yet that is what he held in his language quoted from the opinion denying a new trial and arrest of judgment. If the license was not issued under that act, it was not issued under any, and the court undertook to give to the appellant a privilege to sell liquors without the semblance of authority to do so; the license issued to him was utterly void and he was as guilty of a violation of the statute when he sold malt or brewed liquors under it as he was when he sold whiskey. The court surely never could have intended this, but it is the position into which the commonwealth is driven in asking that the judgment be affirmed. The appellant either had or had not a license. If he had one, it could have been issued to him only under the act of 1887. This certainly ought not to be questioned, and the court below concedes that if it was issued under that act, his right under it was to sell spirituous liquors. This unavoidable concession is found in the following words in the opinion of the court refusing a new trial: 'We agree with counsel for defendants that if this court had granted the Brooks license, it could not have imposed restrictions and conditions of its own making, could not have denied the right given by it, to sell spirituous liquors. We also acquiesce

in the proposition that if it appeared that the court had intended to grant the Brooks license, the fact that its decree or order, following the petition as it does, omits the word 'spirituous' would not prejudice the defendant, for the extent of privilege granted would be controlled by the law under which the decree was made, and with which it would, in such case, have been intended to accord.' A direct authority in support of this manifestly correct view is *Breslin's Case*, 32 N. Y. 210. In issuing a license in that case the board of excise undertook to prohibit the licensee from selling to his guests intoxicating liquors to be used with their meals on Sunday. The statute gave him the right to so sell, and, in deciding that the restriction which the board undertook to place upon the license issued by it was void, the court said: 'A critical examination, assisted by the deliberate and mature consideration and comparison of the act of 1857 (chap. 628) and the several amendments thereof, suggested by the argument at the General Term, demonstrated that the power of the board of excise is limited to the granting or refusing of licenses. If the license be granted, the statutes regulate the rights acquired by it, the restrictions to be observed and the punishment for each violation of its provisions. It cannot, therefore, either enlarge or diminish these rights and obligations, or interfere with them in any way. The officers composing it cannot insert in the license a limitation, restriction or condition which is repugnant to the statute; but if they do so, it is void, and hence the clause in the relators' license absolutely prohibiting the sale of

liquor upon certain days named in it, is, as the result of our construction and interpretation of the statute, unauthorized and nugatory.' And so here, the power of the court below was limited to granting or refusing the license, and, having granted it, the restriction placed upon the holder of it as to the kinds of liquors he could sell under it was 'unauthorized and nugatory.'

We are not concerned on this appeal, involving grave consequences to the appellant, with what the court below intended to do, or with what it had done. Our concern must be only as to what it actually did from the standpoint of the law. If it misunderstood the statute, and did what it now says it did not intend to do, the consequences of its misunderstanding are not to fall upon the head of the appellant. If it did not intend that he should have a license to sell spirituous liquors, its only course, as guided by the law, was to refuse him a license altogether, but, authorized by the law to grant him a license to sell liquors, it gave him one which, for the reasons stated, it is idle to say was not issued under the act of 1887, and, if issued under that act, the court below concedes that the appellant had a right to sell spirituous liquors.

The first nine clauses of the fifth section of the act of 1887 set out in detail just what must appear on the face of a petition for a license to sell liquors at retail. The appellant's petition complied literally with these requirements, and what he set forth as to the kinds of liquors he proposed to sell had no proper place in it, for the statute did not call for this. It was, therefore, mere surplusage. As the act

declares what shall be sold under a license, if the court shall grant it, the petition of the appellant ought not to have been considered as anything else than one for a retail license under the act of assembly, to be refused or granted by the court with such restrictions only upon the right to sell as are fixed by the act. Every jurisdictional averment required by it appeared upon the face of the petition. In this connection it may be proper to note that the court below seems to attach some importance to the fact that the petition was indorsed as one for 'An eating-house license.' This indorsement was no part of the petition, for a rule governing all pleadings is that captions and indorsements are no parts of the paper: *Jackson et al. v. Ashton, 8 Peters,* 148; *In re Gorman,* 15 *Am. Bank. Rep.* 587.

It may be that the appellant did not keep faith with the court, but he was not on trial for that; and it may be that his word was broken, but it was on a promise which the court had no power to exact from him, and for this he is not to go to prison as a convict. The offense charged is selling liquor without a license, and this in the face of a decree of a competent court granting him a license to sell, under which he sold what the statute authorized him to sell as the holder of a retail license. The record, reviewed from a judicial and logical standpoint, discloses a judgment radically wrong. The judgment of the Superior Court is reversed, as is that of the court below, and the defendant is discharged from his recognizance."

H.

New Jersey Court of Errors and Appeals.

NOVEMBER TERM, 1921.

EMANUEL E. KATZ
v.
HENRY H. ELDREDGE
AUGUST CARELL
v.
JAMES W. MCCARTHY
DOMINICK SINISI
v.
JOHN J. MCGOVERN

GUMMERE, C. J.:

The people of the United States, in the year 1919, adopted the Eighteenth Amendment to the Federal Constitution. The first and second sections thereof are in the following words:

> "Section 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into or the exportation thereof from the United States and all territory subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited.
>
> "Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

In the exercise of the power conferred by the second section, the Congress enacted, on October 28, 1919, the National Prohibition Act, popularly known as the Volstead Law. As I read that act, the two fundamental provisions contained in it are (1) that liquor having one-half of one per cent. or more of alcohol by volume shall be held to be an intoxicating liquor, within the meaning of the first section of the amendment; and (2) that any person who violates the provisions of Section 1 of the amendment shall be deemed guilty of acriminal offense, shall be prosecuted for the crime, and, in case of conviction, shall be punished accordingly.

On March 29, 1921, the Legislature of this State passed an act entitled "An act concerning intoxicating liquor used or to be used for beverage purposes" (P. L. 1921, p. 171), and commonly designated as the Van Ness Act. By this statute the Legislature adopts the language of the Volstead Act in defining what shall constitute intoxicating liquor within the meaning of the Eighteenth Amendment, and prohibits the manufacturing, selling, bartering, transporting, importing or exporting of any such liquor, with certain exceptions not pertinent to the consideration of the present cases, and declares that any person who shall violate this prohibition shall, upon conviction thereof before a magistrate, be deemed and adjudged to be a disorderly person and subject to punishment as such.

Under this State statute a large number of prosecutions were instituted against persons al-

leged to have violated its prohibitory provisions, and for the purpose of determining its validity, writs of certiorari were allowed to review the prosecutions. Upon final hearing in the Supreme Court, that tribunal upheld the validity of the State, and judgments of affirmance were entered in the three cases now before us.

Many reasons are assigned before us by counsel for appellants for holding the Van Ness Act invalid, most of which are rested upon the contention that it violates various provisions of our State Constitution. But, in my opinion, the questions of primary importance which the cases present are, first, whether this act is in conflict with the Federal statute so far as it declares that violations thereof shall be considered mere acts of disorder, whereas Congress has declared that the same violations shall constitute the offender a criminal; and, second, if the provisions of the act are to this extent in conflict with the legislation of the Congress, whether, notwithstanding such antagonism, the State statute can be upheld.

That these two legislative enactments are antagonistic the one to the other seems to me to be indisputable; as much so, in fact, as the statute of this State passed March 2, 1920 (P. L. 1920, p. 14), which defined "intoxicating liquor" to be any alcoholic beverage containing more than three and one-half per cent of alcohol by volume, was antagonistic to what I consider the other fundamental provision of the Volstead Act.

Having reached this conclusion, I proceed to the

consideration of the question whether or not, to the extent indicated, the State statute is invalid.

The Supreme Court undertook to sustain the Van Ness Act upon the theory that it was passed by the Legislature in the exercise of the police power of the State, and that this power had never been surrendered to the Federal government. I am unable to concur in this view. It seems to me that the effect of the adoption of the Eighteenth Amendment was to extinguish so much of the reserved police power of the several States as enabled them to regulate or prohibit the dealing in intoxicating liquors, and to substitute, in lieu thereof, the concurrent power conferred by the second section of the amendment upon the several States; that is to say, that the only power which resides in the several States, with relation to this matter, since the adoption of the amendment, is the concurrent power which by the amendment is also vested in the Congress and not an independent power reserved to the States at the formation of the Federal union and never since parted with.

But, even if I am wrong in this view, I should still consider the conclusion of the Supreme Court, that the enactment of the Van Ness Act can be justified as an exercise of the reserved police power of the state, untenable. Assuming that the power of the States to deal with the matter of traffic in intoxicating liquors was never wholly parted with, there was, nevertheless, conferred upon each one of them by the amendment an additional power with relation to this subject mat-

ter, viz., the power to enforce the prohibition declared therein by appropriate legislation. That it was in the exercise of this additional power, and not in the exercise of a reserved police power, that the Legislature passed the Van Ness Act is made apparent, I think, by the declaration contained in the first section of the statute that "The short title of this act shall be the 'Prohibition Enforcement Act;' " for the only then existing prohibition to be enforced by State legislation was that created by the constitutional amendment.

Concluding that this statute was passed pursuant to the authority conferred upon the State by the provision of the second section of the Eighteenth Amendment, and that it is in conflict with the Volstead Act, in that it declares that within the territorial limits of the State a party guilty of a violation of the first section of the Eighteenth Amendment shall not be dealt with as a criminal, but merely as a disorderly person, we are, I think, required to determine whether, notwithstanding such conflict, the State law is valid in the respect indicated.

In considering this question, it is to be borne in mind that the Eighteenth Amendment upon its adoption at once became an integral part of the Federal Constitution, with the same force and effect as if it had been originally written into it; that the original compact, with the various amendments which from time to time have been engrafted upon it and have become component parts thereof, is a single instrument; and that, in de-

termining the scope and effect to be given to any particular provision of it the whole instrument is to be examined for the purpose of harmonizing that particular provision with the other provisions contained in it.

The second section of Article VI of the Federal Constitution as originally adopted declares that "This constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land." Reading this provision in connection with and as illumining the provision of the second section of the Eighteenth Amendment, it seems clear to me that, if the Volstead Law was enacted in pursuance of authority conferred upon the Congress by the Constitution (and that it was, of course, is not controverted), then whenever it appears that a State statute has been enacted which runs counter to any of the provisions of that law, the latter act must be held to be supreme. To hold otherwise is to declare that Section 2 of the amendment operates to repeal pro tanto by implication the second section of Article VI; or, to state it more accurately, perhaps, to amend it so that it now must be read "This constitution and the laws of the United States which shall be made in pursuance thereof (except those made in pursuance of the provision thereof prohibiting the manufacture, sale or transportation of intoxicating liquors, etc.) * * * shall be the supreme law of the land." To take away from the force and scope of Article VI, Section 2 of the Federal Constitution, to the ex-

tent indicated, by judicial construction, if it can be justified at all, is certainly not a function of a State tribunal.

This particular phase of State legislation enacted for the purpose of enforcing national prohibition is one which has not been, so far as I am aware, presented to the United States Supreme Court for its decision. But in the *National Prohibition Cases*, 253 U. S. p. 350, as I understand the reported opinions, one of the questions considered was whether the provision of the Volstead Act with relation to the alcoholic content of intoxicating liquors overrode State legislation which was antagonistic thereto, and that court, in the eleventh proposition of the majority opinion, apparently held that, the Congress having legislated upon that matter, State legislation which attempted to nullify its declaration was invalid. If I am right in my understanding of the decision of the United States Supreme Court upon this point (and the dissenting opinions indicate that I am), it would seem to follow as a necessary sequence that an attempt on the part of a State legislature to nullify any other fundamental provision of the Volstead Law would be equally nugatory.

My conclusion in these cases is that, for the reason I have pointed out, the Van Ness Law is invalid, so far as it attempts to override the act of Congress with relation to the character of the offense of which a violator of the constitutional amendment shall be guilty; and this being so, it seems to me inadvisable to pass upon the soundness

of the contention that this statute also violates the various provisions of our State Constitution.

I am authorized to state that Justice Swayze and Judges Gardner, Ackerson and Van Buskirk concur in the view that I have expressed.

Endorsed:

"Filed February 2, 1922,

"Thomas F. Martin,

Clerk."

I.

Court of Errors and Appeals.

No. ———

NOVEMBER TERM, 1921.

EMANUEL E. KATZ, *Prosecutor-Appellant,* v. HENRY H. ELDREDGE, ET AL., *Defendant-Respondent.*	On Appeal from Supreme Court

KALISCH, J.: My vote for reversal of the judgment of the Supreme Court affirming the conviction of the prosecutor and judgment pronounced on such conviction by the magistrate is based principally upon the ground that the act entitled "An act concerning intoxicating liquor used or to be used for beverage purposes," under which the proceedings were had, is invalid.

1. Prior to the adoption of the Eighteenth

Amendment of the Constitution of the United States the traffic in beer, ale, wine and ardent spirits in New Jersey was under the control and regulation of the Legislature, by virtue of the police power reserved to the State. When the Eighteenth Amendment was adopted by the States and became operative throughout the Union, it deprived this State of the exercise of the police power formerly possessed by it. The people of this State surrendered the exercise of the police power to control and regulate the traffic in beer, ale, wine and spirituous liquors to the Federal government, as a result of the adoption of the Eighteenth Amendment, by the States.

The State's right, therefore, to legislate in regard to the inhibited traffic is derived not from any reserved police power existing in the State, but solely from the second section of the constitutional amendment which gives "The Congress and the several States" "concurrent power to enforce" the amendment "by appropriate legislation."

It is suggested that this section, by granting to the States concurrent power with Congress to enforce the amendment by appropriate legislation inferentially provides a partial restoration to the States of their shorn police power. This is clearly a *non sequitur*. For it is self-evident that the power to enforce the amendment by appropriate legislation is a grant of power solely emanating from the constitutional amendment and the very act of conferring this power upon the State, ex-

cludes, perforce, any notion that there is still abiding somewhere in the State's sovereignty a police power regarding the control or regulation of the liquor traffic.

The Congress having enacted the Volstead law, that law became the supreme law of the land.

We must assume that it is an appropriate legislative act to enforce the constitutional amendment, in the absence of any Federal court decision to the contrary. In fact, many of its provisions which were assailed have been declared valid by the Federal courts. Among these provisions is one which denounces violations thereof to be crimes, obviously, for the reason that such violations are in effect a contemptuous disregard of the organic law of the land.

The present State statute, of later origin than the Volstead act, denounces the doing of any act inhibited by the amendment and declared by the act of Congress to be a crime, as disorderly conduct, and provides for punishment, as such. It classes offenders against the organic law of the land under the head of disorderly persons, who under the law of this State are held to be petty offenders. Thus it is observable that there is a sharp conflict raised between the Federal and the State statute as to what is appropriate legislation to enforce the constitutional amendment. In such a circumstance it is clear that the State law must yield and give way to the Federal act, for the reason that the latter not only expresses the in-

terpretation placed by Congress on the term "appropriate legislation" in the Constitutional Amendment, but by virtue of Article 6, Section 2 of the Constitution of the United States, where it is declared:

"This constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstading." Bearing this in mind, it seems to me to be wholly immaterial in what order of time the Federal and State statutes were enacted and became operative, for the reason that in either event the Federal statute becomes the supreme law of the State, and it necessarily follows that a provision in the State statute antagonistic to any provision of the Federal act becomes nugatory. Now, since the Federal statute has declared, in enforcing the constitutional amendment, that violation of such amendment are crimes, it does not lie within the power of the State to declare such violations to be otherwise.

It is strenuously urged by counsel of respondents that the State statute is merely in aid of the Federal act and since Congress and the States have concurrent power to enact appropriate legislation to enforce the amendment there is nothing prohibitive in the grant of power to prevent a State to legislate upon the same subject. I can readily assent to this proposition, provided the State

legislation is in consonance with the provisions of the Federal law. But it cannot be fairly said that a State statute, which makes petty offenses of acts denounced by the Federal statute, as crimes, is a law in harmony with the Federal law. We may fairly assume that it was not intended by granting concurrent power with Congress to the States to enact appropriate legislation to enforce the constitutional amendment that it was intended to unduly oppress an offender, by subjecting him to be punished twice for the same offense—under the Federal statute for the commission of a crime, and under the State statute for being a disorderly person. In view of Article V of the Federal Constitution, which declares, among other things, "nor shall any person be subject for the same offense to be twice put in jeopardy of life and liberty," it seems to me that it never was intended that a State legislature might, by styling crimes as disorderly acts, petty offenses, evade this constitutional provision. While we have no such provision in our State constitution expressed in that way, we nevertheless retain the common law doctrine on that subject. *State v. Cooper,* 13 N. J. L. 361; *State v. Mowser,* 92 N. J. L. 474.

It is permissible and logical to take the view that in conferring concurrent power upon the States to enact appropriate legislation to enforce the constitutional amendment it was not intended to bring about a change in Article V *supra* of the Federal Constitution, but rather to confer upon

the State the power to legislate so that it may through its courts enforce the constitutional amendment.

I am unwilling to subscribe to any theory that holds that after Congress has presumably enacted appropriate legislation to enforce the constitutional amendment it can be properly said that a State has enacted appropriate legislation in exercising concurrent power, where it has undertaken to incorporate within such legislative enactment provisions which are in conflict with the Federal statute.

Justice Swayze authorizes me to state that he concurs in these views.

I concur in the views expressed by the Chief Justice in his opinion.

Endorsed:

"Filed Feb. 2, 1922.

"Thomas F. Martin,

Clerk."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.
NO. 530.

TONY VIGLIOTTI, Plaintiff in Error,

vs.

THE COMMONWEALTH OF PENNSYLVANIA,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

WILLIAM A. MILLER,
District Attorney.

GEORGE E. ALTER,
Attorney General,
Attorneys for Defendant in Error.

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LIST OF CASES CITED.

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Argument.

Viewed in any aspect it seems very clear that there is no reason why this Court should interfere with this conviction. Whether we consider the law under which the plaintiff in error was convicted as "appropriate legislation" for carrying out the national policy declared in the Eighteenth Amendment, or as a police regulation of our own, affecting a wider field than that covered by the Amendment, we are unable to see any logical reason why it should be stricken down. It shocks the understanding to suggest that a sale of intoxicating alcoholic liquor, conceded to have been illegal and severely punishable under our pre-existing

law, became a lawful thing, to be done with impunity, as the result of a constitutional amendment adopted for the purpose of prohibiting the sale of such liquor. As we read the very extended argument on behalf of the plaintiff in error, and realize that this is the conclusion it is intended to support, we think of the wise statement of Judge Cooley: "Refinement of reasoning that goes to the extent of shocking the common understanding, can never make good law."

I.

Our law, known as the Brooks Law is not limited to intoxicating liquor. *"Without stopping to refine upon the meaning of the word 'intoxicating', or the degree of alcoholic admixture which is necessary to render any liquid intoxicating, it is only necessary to say that the intoxicating quality is not the one which is prohibited by the act, and hence an issue upon that question does not arise under the indictment."*

Commonwealth vs. Reyburg, 122 Pa., 299 p. 304.

That the sale of alcoholic liquor ("vinous, spiritous, malt or brewed liquor," as it was described in our law), *whether intoxicating or not*, is a proper subject for statutory restriction, regulation or prohibition, under the police power of the State, is a proposition which we do not think requires any special argument. Repeated assertions, by Counsel for the plaintiff in error, that the Fourteenth Amendment prevents the State from interfering with the sale of alcoholic liquor

as such, except on the theory that it is intoxicating, are not convincing. The cited decisions do not seem to give any support to these assertions. Where is the authority for saying, as it is said so often in the brief of the plaintiff in error, that alcoholic liquors containing less than one-half of one per cent. of alcohol are "harmless" or "innocuous." The fact that Congress has not classed them as "intoxicating" does not require Pennsylvania to treat them as innocuous. Congress can only legislate concerning intoxicating liquor, that being the limit of the authority conferred by the Amendment, but Pennsylvania is not so limited. If liquor containing one-half of one per cent. of alcohol is intoxicating and its sale merits imprisonment, then liquor containing forty-nine-hundredths of one per cent. of alcohol is a proper subject for consideration by the State, under its inherent powers. And the State has the clear right to interfere with the traffic in alcoholic liquor below the percentage of one-half of one per cent., though it may not class it as intoxicating, because it is well known, (1) that its use has a habit-forming tendency, leading to the desire for drinks more strongly alcoholic; (2) that injurious effects of alcohol on the organs may be incurred without intoxication, and (3) the places where drinks of low alcoholic content are sold are the most likely places and afford the greatest temptation for the illicit sale of stronger drink. These reasons are ample to sustain the action of the State in its inclusion of *all* alcoholic liquors in the prohibitions and regulations provided in the Brooks Law. They justify it in not permitting liquor containing any alcohol to be sold except under a license. They justify the limiting of licenses to persons who have

satisfied the Court as to their moral character, and at a comparatively small number of places, where violations of the law can be watched for and detected and sales made only under the regulations of the law—in no case to minors or persons of known intemperate habits—and subject not only to severe punishment but to loss of the license in case of disobedience of the law. To suggest that the Fourteenth Amendment applies here as it might apply to sales of coal or flour is to go very far in search of a reason.

Not only does the Brooks Law apply to all alcoholic liquor instead of being restricted to intoxicating liquor, but instead of being limited, as the Eighteenth Amendment, to sales for beverage purposes, it forbids the unlicensed sale *for any purpose*, by any one except druggists who, however, are forbidden to sell intoxicating liquor except on prescription of a regular physician.

So Pennsylvania, under the Brooks Law, permitted no one (except druggists as noted) to sell alcoholic liquor except under a license. She did not concern herself whether the liquor was intoxicating or not. A vendor of vinous, spiritous, malt or brewed liquor—alcoholic liquor—must pass a test and be licensed to engage in that business.

Here, then, prior to the adoption of the Eighteenth Amendment, we have the vending of *alcoholic* liquors, a perfectly lawful business, in Pennsylvania, to those licensed to engage in it; absolutely unlawful to those not so licensed. Then the amendment is adopted. What is the effect? The vending of alcoholic liquors

in Pennsylvania is still a prohibited business except to those licensed to engage in it. Those so licensed may still engage in the business, but if they sell liquors of alcoholic strength higher than that fixed by the national legislation they are punished thereunder. The Brooks Law never undertook to "authorize" the license holder to sell anything prohibited by the laws of the United States. It authorizes nothing. What it does is to prohibit the sale of liquor containing any alcohol whatever, for any purpose, except by those who have the State's permission to engage in the business of selling alcoholic liquors.

How can this State regulation be invalidated by the fact that the sale of *certain kinds or grades* of alcoholic liquor, *for beverage purposes*, become unlawful under the national law? Suppose the national law had been aimed only at unduly strong drink and had merely prohibited the sale of any liquor containing more than fifty per cent. of alcohol? Would it be argued that this wholly abolished our State legislation? We think not. But would it have differed otherwise than in degree from the situation here involved?

During all the years the Brooks Law was in force it was unlawful to engage in the sale of liquor containing one-half of one per cent., or more, of alcohol without first having paid a fee or tax and taken out what was called a United States license. The Brooks Law did not provide that vendors licensed under its provisions should take out this United States license or abstain from selling unless they did so. But nobody ever suggested that this invalidated the Brooks Law as

"authorizing" a violation of United States law. Of course the licensee is expected to regard any valid enactment, state or federal, which may curtail the field of operations which the State has permitted him to enter, but the continued extent of which it has in no way guaranteed. The day after the license was issued the State itself could have enacted that no liquor beyond a certain strength could be sold and the license would be no protection against the violation of that statute. But the system, which required a license to engage in the sale of any kind of alcoholic liquor, would have remained absolutely unaffected.

So then, as long as there is any grade or kind of alcoholic liquor permitted to be sold for any purpose under the Constitution and laws of the United States, a State law requiring a license in order to sell alcoholic liquor has a legitimate subject upon which to operate and must remain in full force. It cannot be said that a license issued under it is a license to do what the supreme law forbids. It really has a very large field of operation not yet invaded by the supreme law, to wit, all liquor below one-half of one per cent. of alcohol and all alcoholic liquor for other than beverage purposes.

The plaintiff in error, then, came before the proper Court of the Commonwealth, charged with having sold liquor containing alcohol, without being licensed to sell liquor containing alcohol. He is not indicted for selling intoxicating liquor. He is not indicted for selling liquor *for beverage purposes*. He is not indicted for selling liquor of any specified alcoholic content. It

appeared in the evidence, apparently, that the liquor in question contained something like eighty-eight per cent. of alcohol. But the percentage was in no way relevant. The offense consisted in selling liquor which contained alcohol, however small the percentage and for whatever purpose sold. The indictment appears on page 2 of the printed record. All the jury had to find was that there was alcohol in the liquor. Is it intended to be argued here that the jury should have been instructed that if the liquor sold by the defendant contained less than one-half of one per cent. of alcohol he was guilty, but that if it contained one-half of one per cent., or more, he was innocent? Should they have been instructed that if he sold it for other than beverage purposes he was guilty, but that if he sold it for beverage purposes he was innocent? We respectfully submit that this would be attaining the limits of absurdity. And this as the first fruits of a constitutional amendment devised to stop the sale of intoxicating liquor for beverage purposes. If, without any act upon our part, we find that an excellent, workable, efficient State law has been brought to this grotesque condition through the national action, then we surely have a marvelous system of government.

The foregoing suggestions are entirely in harmony with the opinion of the Chief Justice of the Supreme Court of Pennsylvania in this case (*Com'th vs. Vigliotti*, 271 Pa., 10). We quote the following extracts from that opinion:

> "The Pennsylvania Act of May 13, 1887, P. L. 108, called the Brooks Law, is entitled 'An act to restrain and regulate the sale of vinous and spiritous, malt or brewed liquors, or any admixtures

thereof.' Any liquor containing distilled alcohol is spiritous; all having alcohol as a result of fermentation are vinous, and those with alcohol produced by artificial processes, such as the brewing of beer, come within the malt or brewed class; *these, together, are generally supposed to include practically all kinds of beverages containing even a trace of alcohol.*

"The Brooks Law has nineteen sections, and neither the term 'intoxicating liquors' nor its equivalent is found in any of them till we reach the 4th, which makes it the duty of constables to return all places 'licensed and unlicensed' that are 'engaged in selling intoxicating liquors'; then the 16th section renders it unnecessary for druggists to obtain a license under the statute, but provides 'they shall not sell intoxicating liquors except upon the written prescription of a regularly registered physician,' and 'any person who shall wilfully prescribe any intoxicating liquors as a beverage to persons of known intemperate habits shall be guilty of misdemeanor.' These provisions, together with a prohibition, in the 17th section, against selling to persons visibly affected by 'intoxicating drink,' are absolutely the only references in the statute to 'intoxicating liquors,' *and it will be observed that none of them have to do with defining the kinds of liquors comprehended by the license which this legislation requires. In fact, we early decided that the liquors referred to in the licensing parts of the Act of 1887 need not have an 'intoxicating quality'*: See *Com. vs. Reyburg*, 122 Pa., 299, 304.

"The sale of such liquors" (intoxicating) "was permitted under the Brooks Law, because, and simply because, not forbidden; although there can be no doubt it was intended to the limited extent there tacitly allowed.

"The statute in question was put upon the books at a time when strict prohibition was being agitated in the State, the same legislature which passed it formulating a constitutional amendment to that end, for submission to the people (1887, P. L. 414); and it may well be the thought was in the minds of the law makers that not only did this piece of legislation (the Brooks Law) serve the then present purposes, but it would fit the situation, till a better instrument could be devised, in the event of prohibition coming to pass. At least this suggestion is warranted, not only by the significant absence from the act of the term 'intoxicating liquors,' in connection with the license system there ordained (such term or an equivalent being rather generally used in the earlier Pennsylvania liquor laws), but also by the whole structure of the statute; for it is so drawn that, by the elimination—through subsequent legislation or otherwise—of the possibility of intoxicating liquors being sold thereunder, its terms would admirably suit the control of the business of dealing in those kinds of liquors which most readily become of the intoxicating class, of those liquors under the guise of which intoxicating beverages can be most easily trafficked in. * * *

"And, as previously said, so far as the licensing features of the act are concerned, *the scheme of*

the statute is to regulate the direct distribution to the people not of intoxicating liquors, but of those kinds of liquors among which the former is usually found, and thus to control such distribution for the enforcement of laws regulating the actual use of intoxicating liquors, no matter what, from time to time, these laws may prove to be.
(The italics are ours.)

Of course the statement of the Supreme Court of Pennsylvania as to the meaning and intent of the Brooks Law will be given very great consideration by this Court, and, in so far as it is an interpretation of a Pennsylvania statute, doubtless it will be adopted.

II.

Looking at the case in its other possible aspect, in which we consider whether the Brooks Law, as affected by the Eighteenth Amendment and the Volstead Act, is appropriate legislation for the enforcement of the Amendment, we have it stated by both the Supreme Court and the Superior Court of Pennsylvania that it may well be considered as such legislation.

Judge Henderson, for the Superior Court (*Com'th vs. Vigliotti*, 75 Pa. Superior Ct., 366), said:

> "In our opinion so much of the Act of this State as prohibits the sale of liquor is still in force. It cannot be questioned that the legislature might have repealed the provisions of the Act of 1887, authorizing the granting of licenses leaving in force the prohibitory provisions thereof, and

if this might have been done, why is not the same result accomplished by the paramount authority of the amended Constitution? The effect of that instrument is to invalidate all State laws inconsistent therewith, but it does not operate on any legislation compatible therewith. We regard the Act of 1887 as legislation on two subjects clearly distinguished, the granting of licenses to sell, and prohibiton of sale by persons not licensed. If the authority to license is removed, we see no necessity for holding that permission to sell without license is effected. * * * Is the Act of 1887 'appropriate legislation' within the meaning of the second section of the Amendment? Nothing in the amendment or the act of Congress passed for its enforcement requires us to hold that appropriate legislation must be a State statute enacted after the adoption of the constitutional amendment. * * * The act of Congress is a remedial enactment and should be liberally construed and the advancement of the remedy should be promoted by any construction which can consistently be put on it."

The conclusion of the Court is "that it is appropriate legislation under the second section of the Eighteenth Amendment."

The Supreme Court, in the opinion, rendered by the Chief Justice (*Com'th vs. Vigliotti,* 271 Pa., 10), stated the conclusion

"that the Brooks Law still survives, as Pennsylvania's own police power method of officially listing and adequately controlling the customary

sources of general supply and distribution, to the peoples within her borders, of those kinds of liquors among which intoxicating beverages are usually found, and she may thus assist in prohibiting their illegal use as such; although, of course, not intended for that specific purpose, that statute is adapted to serve as an instrument with which to perform, at least in part, this State's right and obligation to enforce 'by appropriate legislation' the 18th Amendment."

III.

We think the foregoing suggestions are conclusive of this case. If the Brooks Law applied (as the Eighteenth Amendment applies) only to intoxicating liquor and only to its sale for beverage purposes, different principles might operate. But, as we have shown, their spheres of operation are bounded by different circles, the sphere of the amendment being inside, but only covering part of the circle of the Brooks Law.

In this section we shall discuss the law as it might be if the circles were the same, that being, in effect, the theory upon which it seems to have been treated by the plaintiff in error. We think that, even if that were the case—if the Brooks Law applied only to intoxicating liquor for beverage purposes—the Eighteenth Amendment would only result in a modification which would bring the law into harmony with the Amendment.

(a)

Undoubtedly the main purpose of the Brooks Law was prohibitive. The prohibition was general. The right to sell was exceptional.

> "All sales of liquor under the Act referred to herein are presumed to be unlawful. The very language of the Act makes this apparent:"
>
> *Commonwealth vs. Wenzel,* 24 Pa. Superior Ct., 467.

In *People vs. Foley,* 184 N. Y. Sup., p. 271, this language relating to the New York Excise Law is approved: —

> "This statutory provision is prohibitive. It absolutely prohibits anybody from making a sale of liquor within the limits recognized in the statute, unless he has a license."

(b)

Some decisions having a bearing upon the operation of pre-existing State laws as affected by the Eighteenth Amendment and the Volstead Law may be of interest and assistance to the Court.

The case of *Commonwealth vs. Nickerson,* (Mass.) 128 N. E., 273, dealt with the Massachusetts statute as affected by the Eighteenth Amendment.

The Massachusetts statute provided:

> "No person shall sell or expose or keep for sale, spiritous or intoxicating liquor except as authorized in this chapter * * *"

and specified in what manner a license might be procured, after an election held, etc., to authorize legal sale.

This is very similar to the plan of the Brooks Law, except that it seems to be limited to intoxicating liquor instead of to every kind of alcoholic liquor.

With reference to this statute the Chief Justice of Massachusetts said, in the case cited:—

> "The general purpose of R. L. c. 100 is prohibition, except as local option manifested by annual votes in the several municipalities effectuated by the granting of licenses through municipal boards, may result in a regulated method of sales by licensees. The burden of proving such authorization rests upon a defendant, however. Upon a complaint for an illegal sale, the commonwealth makes out its case by showing a sale of intoxicating liquor. The defendant, in order to escape conviction, must prove his license. * * * As a matter of statutory construction, the prohibition is general; the license is exceptional. The latter is dependent upon the efficacy of a valid local vote and a genuine license. This being the purpose and plan of the statute, its prohibitory features are not so dependent upon those respecting license as to be swept away when those as to license are stricken down by the Eighteenth Amendment. The general rule of the statute continues to prevail, even though the law has so changed that the special defense can no longer be made out."

If the reasoning of the Supreme Court of Massachusetts in the above case is sound, it is a very appropriate answer to the repeated contention of the plaintiff in error here, that the Brooks Law is indivisible, and that to treat its prohibitory features as valid, as now affected by the Eighteenth Amendment and the Volstead Act, is to enforce a statute not made by the legislature.

Further quotation from the opinion of the Superior Court, in the present case (*Com'th vs. Vigliotti,* 75 Pa. Superior Ct., 366), may be of interest in this connection:

> "Here is a statute the integrity and vitality of which could not have been questioned prior to the change in the Federal Constitution. It had two purposes, to permit the granting of licenses to sell to some persons, and to forbid all other persons from dealing in the merchandise described. It is obvious that the amendment supersedes as much of the law of the State, as permits the granting of licenses to sell intoxicating liquors for beverage purposes. * * *
>
> "We have then a situation in which the amendment of the Constitution renders invalid a part of the statute of this State, but is in entire harmony with another part thereof. Is the part which is not in conflict with the federal law self-sustaining and capable of enforcement? In our opinion, so much of the act of this State as prohibits the sale of liquor is still in force. It cannot be questioned that the legislature might have repealed the provisions of the Act of 1887 authorizing the granting of licenses, leaving in force

the prohibitory provisions thereof, and, if this might have been done, why is not the same result accomplished by the paramount authority of the amended Constitution? The effect of that instrument is to invalidate all State laws inconsistent therewith, but it does not operate on any legislation compatible therewith. We regard the Act of 1887 as legislation on two subjects clearly distinguishable, the granting of license to sell, and prohibition of sale by persons not licensed. If the authority to license is removed, we see no necessity for holding that permission to sell without license is affected. This we think is contrary to the express terms of the second section of the Amendment and to the implied power existing in the State irrespective of such express permission, and having in view the terms and objects of the State statute, it seems evident that its provisions with respect to licenses are not so dependent on and interlocked with its prohibitory provisions that the authority to grant licenses can not be abrogated without at the same time overthrowing its prohibitory features."

* * * * * * * * *

"It is contended, however, that the provision for the granting of licenses is inseparably connected with the other provisions of the Act, and that the Legislature would not have enacted the law without its license provisions. It may be conceded that the Legislature intended that some licenses should be granted, at least the authority to so act was vested in the discretion of the courts of Quarter Sessions, but the legislative intent is not a determining fact in the consideration of the

question before us. That question is: Did the adoption of the amendment to the Constitution abrogate all the law of the State relating to the vending of liquors?"

In this connection we may quote further from the opinion in the Massachusetts case of *Commonwealth vs. Nickerson*:

"These provisions of R. L. c. 100, however, tend toward the enforcement of the main end of the Eighteenth Amendment of prohibiting the sale of intoxicating liquors for beverage purposes. They are not repugnant to the provisions of the Volstead Act, in the sense that they are mutually antagonistic and incapable of being concurrently enforced."

* * * * * * * * *

"The point now is to ascertain whether the parts under which the present complaint is brought still remain valid and enforceable.

"This point is not the same which would arise where a whole statute has been enacted some parts of which are beyond legislative power under then existing constitutional provisions * * *

"The intent of the Legislature is not germane to the present inquiry. Its intent existed at the time of the enactment of the statute. Its expression of intent then indubitably was valid throughout. The statute was altogether impregnable in its constitutional aspects. The precise question is how much of a statute perfectly valid throughout at the time of its enactment remains enforceable now that since its enactment a superior power has

supervened with a fundamental governing law at variance with some of its terms."

There is force in the contention of the Supreme Judicial Court of Massachusetts, in *Commonwealth vs. Nickerson, supra*, that the case arising where part of a statute is rendered inoperative by the mandate of superior authority is not the same as that which arises concerning a statute part of which was unconstitutional when originally enacted. In the latter case the entire legislative intent never does become operative. It is perhaps necessary in the latter instance to show independent provisions or at least a general and particular intent, one of which is not a transgression of the Constitution, in order to save any part of the statute, but such is not the case at bar. Here the whole statute was originally valid and effective. Suppose a paramount authority does cut off one of the limbs of the legislative creation. Is it not more analagous to an amendment by the legislature itself?

Of course the legislature might have stricken out of the Brooks Laws its license features, without destroying its general prohibition clause. It can strike out a portion of an existing statute and allow the remainder to stand as the law. It can amend or repeal by implication. New legislation covering part of the original subject matter does not necessarily repeal the whole of the former Act.

> "Between the two acts there must be plain, unavoidable and irreconcilable repugnancy, and even then the old law is repealed by implication only pro tanto, to the extent of the repugnancy.

If both acts can, by any reasonable construction, be constructed together, both will be sustained:" *36 Cyc.*, pp. 1074, 1075 and 1076, and cases there cited.

It is suggested that an amendment to the Constitution of the United States is the enactment of a law by competent authority, taking effect prospectively; it is legislation by the Supreme legislative power, the States of the Union, in which the Commonwealth of Pennsylvania takes part, and as much legislation for Pennsylvania as if enacted by its General Assembly. It is not foreign or extra territorial. This legislation, thus adopted, invalidated existing State law only pro tanto to the extent that the old law was plainly unavoidably and irreconcilably repugnant to the amendment.

(c)

The main contention of the plaintiff in error seems to be that the Amendment destroyed the police power of the States so far as it extended to the manufacture, sale, importation exportation and transportation of intoxicating liquors for beverage purposes.

Of course the State had complete police power over the traffic in intoxicants within their borders, prior to the Amendment, and Congress had none. We can submit nothing better on this point than the discussion of Judge Henderson of the Superior Court of Pennsylvania in this case:

"When regard is had to the object of the

amendment and the reasonable means to be adopted for its enforcement, the argument seems convincing that the purpose in the use of the words 'concurrent power to enforce' was to continue in the several states the authority theretofore existing under the police power to establish prohibition, and to confer on the federal government a like power which had not theretofore existed. Congress and the legislatures of the states are placed on the same footing. The word concurrent is used in the sense of existing together, concomitant, operating at the same time along parallel lines toward the accomplishment of the same purpose. If it had been the intention of the people in amending their Constitution to assume exclusive control of the subject, this would have been done by appropriate words or by conferring on Congress exclusive authority to legislate on the subject. By reference to the thirteenth, fourteenth and fifteenth amendments, will be observed that authority to enforce the provisions thereof is given to Congress alone. The presumption is warranted that the grant of authority in the Eighteenth Amendment was intended to be different, and that express authority to the state was declared to avoid the controversy so often arising with respect to conflict of authority between the Federal and State governments. The purpose was to abolish the use of intoxicating liquor as a beverage and it doubtless occurred to the minds of the framers of the amendment that this could be more expeditiously, economically and successfully accomplished if the Federal government and the States co-operate to

that end. There is thus left to the states the same police power with respect to liquors which theretofore existed, subject however to the prohibitions of the amendment. We are constrained to hold therefore that the authority conferred on Congress by the Eighteenth Amendment is not exclusive and that by the express language of the amendment like authority of enforcement resides in the several States. Such authority must not be exercised in antagonism to the legislation of the Congress on the subject, but within the limitations indicated it is a lawful power effective to enforce State legislation having for its object the suppression of the traffic in spirituous, vinous and malt liquors or admixtures thereof."

In *Reid vs. Colorado*, 187 U. S., 137, this Court said:

"It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said, and the princple has often been reaffirmed—that, 'in the application of this principle of supremacy of an Act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.' *Sinnot vs. Davenport*, 22 Howard, 227, 243."

In *Allen vs. Commonwealth,* (Va.) 105 S. E., 589, the Court said:

> "The state has legislated and may still further legislate, if it so desires, in its own separate domain in its exercise of the State police power expressly reserved with respect to the State offenses as aforesaid, with which legislation the Federal government is powerless to interfere under the Eighteenth Amendment.
>
> "Under the view which we take of the subject, any statute which the State may have enacted or may enact creating or not creating the State offenses aforesaid would not be in conflict with the Volstead Act, or with the Eighteenth Amendment, unless and only to the extent that such state statute should attempt to nullify the Federal law creating the Federal offenses aforesaid. The State law could not authorize the commission of the offenses condemned by the Federal law so as to permit the offender to go free of punishment under the Federal law. It can, however, impose or withhold punishment for such conduct as state offenses or impose different punishments for state offenses consisting of the same conduct."

In *Ex parte Crookshank,* (District Court, S. D. California), 269 Federal, 980, the Court said:

> "The circumstances leading up and attending upon the submission and ratification of the Eighteenth Amendment to the Federal Constitution are of such recent occurrence as to require no restatement at this time. Previous to the adoption of that amendment, it was the established law that the

several states possessed the amplest authority, under the police power, to regulate and even absolutely prohibit the liquor traffic in any of its various form or occurrences. * * * It may not, I think, be maintained with success that in the adoption and ratification of the Eighteenth Amendment the several states were surrendering any of the powers theretofore possessed by them, respecting their own jurisdiction to prescribe effective prohibition of that traffic. In all that was done, they were simply conferring upon the Federal government the like power to prohibit which theretofore, in virtue of its organization and the character of the powers reserved to the states, it had not possessed. * * * In other words, there was a surrendering by the states of the power to permit the liquor traffic, but no diminution of their power to prohibit it; they accorded to the Federal government the jurisdiction to enforce absolute prohibition of the traffic; * * * but they still retained the same right to themselves."

To quote once more from *Commonwealth vs. Nickerson,* we find in the opinion (page 283) the following:

"The circumstance that R. L. c. 100, was enacted prior to the adoption of the Eighteenth Amendment does not prevent it from being "appropriate legislation' to enforce that amendment. The words 'appropriate legislation' in that amendment do not of necessity require future and exclude existing legislation. A state law already enacted is within the purview of the words 'appropriate legislation' as used in the Eighteenth Amendment. If

existing legislation is adapted to the end in view, it is enforceable.

"As has already been pointed out the subject of the regulation or prohibition of traffic in intoxicating liquors, apart from inter-state or foreign commerce in them, was within the police power of the several states until the adoption of the Eighteenth Amendment. *Mugler vs. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed., 205. That amendment conferred no new power upon the states, so far as concerns the provisions of R. L. c. 100. It recognizes and continues and to a certain extent limits pre-existing power. It confers new power upon the Federal government. It does not expressly abrogate existing state legislation rationally adapted to the enforcement of the amendment. If that had been the purpose of its framers, expression thereof would have been simple and natural. Omission of words indicative of that purpose are significant that it did not exist."

In *Jones vs. Hicks*, (Georgia), 104 S. E. 771, at page 774, the Court said:

"Under the terms of the tenth amendment to the Constitution of the United States, as universally construed, the states, prior to the ratification of the Eighteenth Amendment, possessed the exclusive power over this subject; therefore when they delegated to the United States the 'concurrent power' to enforce the amendment, they delegated only a part of their sovereign power over the subject. They parted with none of their own power 'to enforce' prohibition within their own

sphere of action. The amendment and legislation thereunder by the Congress does not impair the integrity of any existing state statute to enforce prohibition, nor can it interfere with the enactment of any future legislation by the state for that purpose."

In the case of *City of Shreveport vs. Marx*, (La.) 86 So. Rep., at page 604, the Court said:

"The purpose of the amendment and the Volstead Act was and is the enforcing of prohibition, and only such legislation as might tend to defeat that purpose would produce such conflict; while, on the other hand, any law which had the effect of aiding in its accomplishment could not be said to impede either amendment or statute, although the state statute might provide additional or identical means to the common end; otherwise the clause giving concurrent power to the states to enforce the amendment would be meaningless. It is true that the Act No. 8 of 1915 was in force when the Eighteenth Amendment and the Volstead Act became effective, but nothing therein has been pointed out, nor have we been able to find anything in the state law with which they conflict."

To the same effect are the decisions in the following cases:—

State vs. Fore, (N. C.) 105 S. E., page 334;
People vs. Foley, Vol. 184 N. Y. Sup., page 270;
Franklin vs. State, 227 S. W. (Texas), page 486;

State vs. District Court of Hill County, (Montana), 194 Pac., 308.

The plaintiff in error has apparently placed some reliance on the case of *State vs. Green,* (La.), 86 Southern, 919, in which, however, the Court seems neither to give reasons nor to cite authorities.

If the power of the States to legislate along these lines existed before the adoption of the Amendment and continued thereafter, subject only to the requirement of harmony with the first section, then the date of any state legislation on the subject becomes entirely immaterial.

IV.

The plaintiff in error lays emphasis upon the argument that the Courts of Quarter Sessions have no power to grant licenses varying in terms from the licensing provisions of the Brooks Law. We think it is needless to spend time on that question. The Court of Quarter Sessions has nothing to say about the matter except "license granted" or "license refused." In practice they have usually said the latter. But the law, not the Court, determines the effect of the granting of the license.

As we have stated in Section I. of this argument, the license is merely the permit without which (except for the special provision relating to druggists) no person can sell any liquor containing any alcohol, for

any purpose, within the limits of Pennsylvania. We fail to see how it can help this offender to argue that the license lifted the ban of this statute against all alcoholic liquors. He had no license. No ban ever was lifted as to him.

But he argues that if the license under the Brooks Law lifted the ban of that particular statute against the sale of intoxicating liquors for beverage purposes, as well as against all other alcoholic liquors for all other purposes, then the Brooks Law has ceased to be a law at all. Amazing result!

The most that can be possibly claimed by the plaintiff in error is that, although national legislation now prohibits the sale of intoxicating liquor for beverage purposes, the holder of a license under that Brooks Law cannot be punished under the Brooks Law for selling such liquor for said purposes. Suppose he cannot?

The vice of the thinking upon the part of the plaintiff in error seems to be this: that if the license-holder under the Brooks Law cannot be punished for selling intoxicating liquor for beverage purposes, then the Brooks Law *"authorizes"* such sales. Upon this manifest fallacy rests the whole structure of reasoning through which this gross violator of both state and national law would escape the just punishment of his crime. As we have said before, the Brooks Law authorizes nothing; it only forbids. A statute independently passed by the Legislature of the State, prohibiting the sale of intoxicating liquor by any one, for any purpose, would have required no amendment of the Brooks Law.

There would have been no conflict. The language of the license would not have been changed. It would still give him permission to engage in the business of selling alcoholic liquor, but would be no protection if he sold alcoholic liquors of any particular kind or for any particular purpose otherwise forbidden by law. If he did so he would have to answer to such law.

The Brooks Law does not purport to give any protection against the prohibitions of any national law. Hence there can be no conflict. In principle, assuming that, in the case of the licensee, the Brooks Law neither forbids nor punishes the particular thing forbidden by the national law, the situation of the licensee is similar to that of the holder of a United States license, in a prohibition State, under the old law. It was held there that the license merely gave the holder protection against the United States statutes, as a compliance with the condition upon which those statutes permitted the holder to engage in the liquor business, but that there could be no pretense of their giving him any rights whatever as against the law of the State wherein the license was effective.

As we have quoted from the opinion of the Chief Justice of the Supreme Court of Pennsylvania in deciding the present case:—

> "The sale of such liquors was *permitted* under the Brooks Law, because, and simply because, not forbidden."

To all except those who held licenses, such sales were strictly forbidden, but we have it contended here

that the moment they were also forbidden by the Constitution of the United States they became lawful and innocent. It cannot be.

We see no reason to extend this discussion. We submit that a reversal of this conviction would be without justice, reason or precedent.

Respectfully submitted,

WILLIAM A. MILLER,
District Attorney.
GEORGE E. ALTER,
Attorney General.
Attorneys for Defendant in Error.

In The

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1921.

No. 530.

TONY VIGLIOTTI, *Plaintiff in Error*

vs.

THE COMMONWEALTH OF PENNSYLVANIA,

Defendant in Error.

MOTION TO ADVANCE.

WILLIAM A. MILLER
GEORGE E. ALTER,
Attorney General.
For Defendant in Error.

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SUPREME COURT OF THE UNITED STATES,

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Defendant in Error.

MOTION TO ADVANCE.

Now comes the defendant in error, the Commonwealth of Pennsylvania, by William A. Miller, District Attorney of Fayette County and George E. Alter, Attorney General, who respectfully move the Court to advance this case on the docket of the Court and grant an early hearing therein, for the following reasons:—

1. Because the decision in this case will determine whether there is any law of the Commonwealth of Pennsylvania prohibiting the sale or furnishing of intoxicating liquor, the Act passed for said purpose (No. 192, approved May 5th, 1921) being an amendment of the Act of May 13th, 1887, P. L. 108, and the contention of the plaintiff in error being that prior to the passage of said Act of 1921 the said Act of 1887 had been nullified and in effect repealed by the adoption of the Eighteenth Amendment to the Constitution of the United States and the passage of the Act of Congress known as the Volstead Act.

2. In the one county wherein the said case was tried there are fourteen other cases wherein defendants have been sentenced for violations of the said Act of May 13th, 1887, to pay fines ranging from $500 to $3,000, and to terms of imprisonment ranging from three months to one year, all of which are being suspended pending the determination of the case now before this Court.

3. The conviction of the said plaintiff in error in the Court of Quarter Sessions of Fayette County was affirmed, on appeal, by the Superior Court of Pennsylvania and on further appeal was likewise affirmed by the Supreme Court of Pennsylvania, but the bringing of the case to this Court has created a feeling of uncertainty which greatly handicaps the enforcement of the law, rendering it uncertain whether there is any law in force.

VIGLIOTTI *v.* COMMONWEALTH OF PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 530. Argued March 14, 1922.—Decided April 10, 1922.

The law of Pennsylvania of May 13, 1887, known as the Brooks Law, which prohibits sale of spirituous liquor without a license, is not at variance with but rather in aid of the prohibitions of the Eighteenth Amendment and the National Prohibition Act, and was not superseded by them. P. 408.

271 Pa. St. 10, affirmed.

ERROR to a judgment of the Supreme Court of Pennsylvania affirming a conviction and sentence of the plaintiff in error for a violation of a law of the State against selling liquor without a license.

Mr. Frank Davis, Jr., and *Mr. H. S. Dumbauld*, with whom *Mr. E. C. Higbee* and *Mr. A. E. Jones* were on the brief, for plaintiff in error.

The Brooks Law is a regulation of the sale of intoxicating liquors. *Schlaudecker* v. *Marshall*, 72 Pa. St. 200, 206; *Raudenbusch's Petition*, 120 Pa. St. 328; *Venango County Liquor License*, 58 Pa. Super. Ct. 277; *Gregg's License*, 36 Pa. Super. Ct. 633.

So much of the law as relates to liquors not intoxicating in fact is only incidental to this primary object. Construed otherwise than as a regulation of the sale of intoxicating liquors, the law violates the Fourteenth Amendment.

The law therefore conflicts with the Eighteenth Amendment, *National Prohibition Cases*, 253 U. S. 350; and such parts as do not are not separable and the statute must fall as a whole, *Employers' Liability Cases*, 204 U. S. 463; *Warren* v. *Mayor*, 2 Gray, 84; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 564.

The purpose of the Eighteenth Amendment and the Volstead Act is to annihilate the traffic in intoxicating liquors and thereby eliminate the evils that flow from it.

The purpose of the Brooks Law was not to destroy this traffic. It undertook to minimize the evils attendant upon the unregulated sale of intoxicating liquors by establishing a system where such sales could be made only by persons and at places licensed for that purpose by the Courts of Quarter Sessions, to the extent that was necessary for the accommodation of the public.

The two systems are diametrically opposite. *United States* v. *Yuginovich*, 256 U. S. 450; *State ex rel. Rose* v. *Donahey*, 100 Oh. St. 104; *Draper* v. *State*, 6 Ga. App. 12; *State* v. *Tonks*, 15 R. I. 385.

Section 1 of the Eighteenth Amendment is an absolute prohibition throughout the entire territorial limits of the United States. *National Prohibition Cases*, 253 U. S. 350. In and of itself it conferred upon Congress a power to legislate for its enforcement. Concurring opinion White, Ch. J., 253 U. S. 390; Const., Art. I, § 8, cl. 18.

The Thirteenth Amendment, § 1, is closely analogous. *Civil Rights Cases,* 109 U. S. 3. The whole subject-matter of the manufacture, importation, exportation, transportation and sale of intoxicating liquors for beverage purposes is lifted out of the control of the States and by the fundamental law of the United States absolutely prohibited. The Amendment transferred this subject-matter from the sovereignty of the respective States to the sovereignty of the United States.

The object of the Amendment was to destroy the governmental power of the several States in respect of the subject-matter embraced in it. The police power of the State is actually abolished so far as intoxicating liquors for beverage purposes are concerned. *Katz* v. *Eldredge,* 117 Atl. 841.

Since the prohibition of § 1 of the Amendment is national, Congress, the agency of national power, has the right in virtue of that section to define prohibited beverages and enact suitable regulations and provide adequate penalties to effectuate and enforce it.

The right of the States is to enforce the Amendment, as defined and sanctioned by Congress, by appropriate legislation. Section 2 of the Amendment is: "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." Since the same power is lodged in the States by the same words that confer it upon Congress, the fair inference is that it was in like manner conferred upon the States and not reserved to them.

Since § 1 in and of itself destroyed the police powers of the States so far as intoxicating liquors for beverage purposes are concerned, the only power of the States in connection therewith must be that granted by the Amendment itself.

The power thus granted is limited to enforcement of the Amendment, but as Congress had power and right

independently of § 2, to prescribe definitions of intoxicating liquors for beverage purposes and to make regulations and provide penalties, the power conferred by § 2 is additional or supplemental to that, and the States have no greater or different power from that specifically conferred upon Congress. *National Prohibition Cases, supra,* 391.

In legislating for the enforcement of the Amendment, the States do not act in virtue of their police powers inherently possessed as sovereigns, but in virtue of a power conferred upon them by the people of the United States. In this respect they are administrative agents or mandataries of the United States. *National Prohibition Cases, supra,* 387, conclusions 7 and 8.

In enacting legislation for the enforcement of § 1 of the Eighteenth Amendment, Congress could have provided that, like the naturalization laws, it might be enforced in the state courts, even if § 2 did not exist, but it would not be required to do so. Section 2 does not leave it optional with Congress. Each State may determine for itself, whether it will enforce the Amendment. If it determines to do so, it is the Amendment as already made completely operative by congressional action that is to be enforced.

These questions have been considered by the Supreme Courts of a number of States. *Commonwealth* v. *Nickerson,* 236 Mass. 281; *State* v. *District Court,* 58 Mont. 684; *State* v. *Fore,* 180 N. Car. 744; *People* v. *Foley,* 184 N. Y. S. 270; *Allen* v. *Commonwealth,* 129 Va. 723; *Jones* v. *Hicks,* 150 Ga. 657; *State* v. *Green,* 148 La. 376; *Hall* v. *Moran,* 81 Fla. 706; *Burrows* v. *Moran,* 81 Fla. 662; *Johnson* v. *State,* 81 Fla. 783.

Mr. George E. Alter, Attorney General of the State of Pennsylvania, with whom *Mr. William A. Miller* was on the brief, for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

In the Court of Quarter Sessions of Fayette County, Pennsylvania, Vigliotti was found guilty of selling, during the spring of 1920, spirituous liquor without a license, in violation of § 15 of the Act of May 13, 1887, P. L. 108, known as the Brooks Law. The liquor so sold was a preparation called Jamaica Ginger containing 88 per cent. of alcohol. The defendant claimed seasonably that the state law as applied deprived him of rights guaranteed by the Federal Constitution, because the sales complained of had been made after January 16, 1920, when the Eighteenth Amendment became effective, after which the Volstead Act was the only law applicable to sales of intoxicating liquors. This claim was overruled by the trial court; the defendant was sentenced; the judgment was affirmed by both the Superior Court, 75 Pa. Super. Ct. 366, and the Supreme Court of the State, 271 Pa. St. 10; and the case comes here on writ of error under § 237 of the Judicial Code as amended. The question presented for our decision is whether the provision of the Brooks Law here applied had been superseded by the Eighteenth Amendment and the Volstead Act.

The Brooks Law, as construed by the courts of the State, prohibits every sale of spirituous liquor without a license, excepting only such sales as are made by druggists; and these are forbidden to sell intoxicating liquors except on prescription of a regular physician. The law applies however small the percentage of alcohol and although the liquor is not intoxicating. It applies to liquor sold solely for industrial uses. It does not purport to confer upon anyone anywhere the right to a license; nor does it authorize the sale of liquor in any city or county having a special prohibitory law. It merely grants to the appropriate officials, where such authority exists, discretion to

give or to withhold the license under the conditions prescribed. In case of an indictment for selling without a license, a sale is presumed to be unlawful and the burden is on the defendant to show the authority on which he acted. It is thus primarily a prohibitory law; and its prohibitory features are not so dependent upon those respecting license as to be swept away by the Eighteenth Amendment and the Volstead Act. The Supreme Court declared further that "the Brooks Law still survives, as Pennsylvania's own police power method of officially listing and adequately controlling the customary sources of general supply and distribution, to the peoples within her borders, of those kinds of liquors among which intoxicating beverages are usually found, and she may thus assist in prohibiting their illegal use as such." 271 Pa. St. 15. We, of course, accept as controlling the construction given to the statute by the highest court of the State. The question before us is whether so construed the statute violates the Federal Constitution.

The Brooks Law as thus construed does not purport to authorize or sanction anything which the Eighteenth Amendment or the Volstead Act prohibits. And there is nothing in it which conflicts with any provision of either. It is merely an additional instrument which the State supplies in the effort to make prohibition effective. That the State may by appropriate legislation exercise its police power to that end was expressly provided in § 2 of the Amendment which declares that "Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." *National Prohibition Cases*, 253 U. S. 350, 387. That the Brooks Law as construed is appropriate legislation is likewise clear. To prohibit every sale of spirituous liquors except by licensed persons may certainly aid in preventing sales for beverage purposes of liquor containing as much as one-half of one per cent. of alcohol; and that is what the Volstead Act

prohibits. If the Brooks Law as construed had been enacted the day after the adoption of the Amendment it would obviously have been "appropriate legislation." It is not less so because it was already in existence.

Affirmed.

MR. JUSTICE DAY and MR. JUSTICE MCREYNOLDS dissent.